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CONVEYANCER'S NOTEBOOK.

Exactly six volumes of the *Conveyancer* were issued under the shadow of war and we think that, in thanking our subscribers for their continued support in those troublous times, it is fitting that we should also wish them a time of peace and prosperity in the era now opening before us all. At the time of writing we have no hint of when and how the Emergency Provisions that have added to the labours of conveyancers will come to an end. It is to be hoped that in some way provision may be made for clearing titles for the future of the various incumbrances, such as the limits on powers of sale by mortgagees, which were temporarily imposed. Some simple enactment might remove the obligation on purchasers to ascertain that compliance with these emergency requirements had been fulfilled. Such relief is the more desirable because it is clear from forecasts of future legislation that other problems are likely to arise. We hope to be able to deal with these as legislation is passed. One example is the new position of requisitioned property under the Requisitioned Land, etc., Act, 1945, of which a short account appears elsewhere in this number.

As after the last war there seems to be the prospect of a conveyancing " boom ". Again, as after the last war, this " boom " is likely to be accompanied by a shortage of trained staff to deal with the mass of business. Though the casualties of this war are mercifully light compared with the last war, the period of time of those away in the war has been much longer, and apart from all the mass of new law, memory, particularly among the younger lawyers, is likely to prove very treacherous in the intricate details of a subject which always involves close attention to *minutiæ*. We have, however, certain advantages over that last time in many shorter abstracts of title through the beneficent provisions of the Property Legislation of 1925, but accompanying these advantages are certain technicalities which, if not observed, may lead to considerable difficulties. In particular the number of unintended settlements and trusts for sale which are not dealt with in accordance with the provisions of the legislation require constant vigilance. With a shortage of trained staff these matters afford more difficulty than in normal times and particularly where the

practitioner is hard pressed. If subscribers have any suggestions of any way in which contributions in this journal would particularly assist we should be glad to give them the closest attention.

Compulsory acquisition—Town, etc., Planning Act, 1944.—The Lord Chancellor has made an order under section 58 (6) of the Town, etc., Planning Act, 1944, to define the person entitled to compensation as an owner-occupier where the occupation is by a trustee or a person holding for the benefit of another. The order is largely made by way of a schedule of analysis which is too complicated for insertion in these notes. Roughly speaking, the person entitled to claim such compensation is the person beneficially entitled in possession under the settlement or trust, except that in the case of death the question is one of occupation by the testator or intestate and not the personal representative. The order, No. 759/L.12/1945, must be referred to in any particular case.

Enemy property—forfeiture of determinable interests.—There have been a number of decisions (the latest of which is noted *post*, p. 58) concerning the effect of the Trading with the Enemy Act, 1939. "Enemy" for the purposes of this Act includes persons other than enemy nationals and, in particular, may include British nationals resident in enemy-occupied territory. As their property may be vested in the Custodian of Enemy Property this may have the effect of determining an interest determinable by vesting in another. It depends upon the terms of the grant as the cases show.

A further order has been issued by the Board of Trade (S. R. & O. 887/1945) by virtue of which any debt or the right title and interest in any money payable to or for the benefit of an enemy will vest in the Custodian of Enemy Property *provided* that the vesting will not take place if the vesting would cause the forfeiture or determination of any such debt or interest. This exception is certainly advantageous, but it should be noted that the definition of enemy is restricted. The order is dated July 21, 1945, and enemy is confined to States and persons incorporated by States at war with His Majesty and any person resident in any area under the *sovereignty* of a Power with whom His Majesty is (presumably now read "was at the date of the Order") at war, *not* being an area occupied before July 10, 1943, by His Majesty or by a Power allied with His Majesty. It also includes bodies of persons controlled by enemy States or persons or carrying on business in such territory as aforesaid. These provisions are obviously highly technical and will require close attention in any particular circumstances.

Water supplies—powers of water undertakers.—The Water Act, 1945 (sixty-three sections and five schedules, of which one has ninety-four clauses) seems to wear the shape of things to come. It is a comprehensive Act enabling the Minister of Health in conjunction with

water undertakers to provide, manage and control the water supplies of the country. Country practitioners, at least in some districts, are fully alive to the innumerable problems to which water has given rise in the past and will not, therefore, be surprised at the length and detail of the Act. Nevertheless it is not easy for the practitioner, and still less for the layman, to deal with this kind of legislation. For example, we find in section 7 that any person who proposes to sink, for the purpose of searching for or abstracting water, a well or borehole intended to reach a depth of more than fifty feet below the surface shall give notice in writing to the Committee of the Privy Council for Scientific and Industrial Research before doing so. He must then keep a journal of the progress of the work, etc., and supply a copy of it to the said Committee and also allow entry and inspection. Failure to do these things is a criminal offence punishable by a substantial fine. "Well or borehole" does not seem to be defined, but we seem to remember being told that the well of a private house sunk as an artesian well should be not less than a hundred feet. Unless the supply of water in country districts is immediately altered we wish the D.S.I.R. (as the scientists call it) joy of the inquiries, etc. But how many householders contemplating an improved water supply know of this section? The copy of the journal can be required to be confidential, but consent to disclosure is not to be unreasonably withheld. Appeal lies to the Railway and Canal Commission. Elsewhere appeal may be to the High Court. Elsewhere appeal may not lie at all. In fact the customary jumble.

There are, of course, wide powers for the acquisition of land or easements or rights over land or water (see particularly sections 22–26). The Act expressly contemplates such acquisition being by agreement, and in a few cases such as acquisition to provide houses for workers or recreation grounds the acquisition must be by agreement, but there are also wide compulsory powers. Most of these may only be exercised with the sanction of the Minister and there are very detailed regulations concerning the procedure to be adopted.

There are also wide powers to control and prevent pollution of water: see particularly sections 14–21. To pollute by any act or neglect any spring, well or adit, the water from which is used for human consumption in the manufacture of food, is an offence, except that the section does not restrict any method of cultivation which is in accordance with the principles of good husbandry or the reasonable use of oil or tar on any highway where all reasonable steps have been taken to prevent pollution (section 21). Whether the exceptions were intended as lighter relief to a dreary piece of legislation we do not know, but to cultivate for persons already poisoned by polluted water seems odd. But most of these powers of control are to be exercised by making by-laws with the approval of the Minister: see, *e.g.*, sections 17 and 18. These by-laws may apparently vary from district to district, but we may point out, for example, that a by-law may forbid the construction or extension of any well, borehole or other work for the purpose of abstracting water without the licence of the Minister: section 14. What is more, if the by-law is made then any person wishing to make a new boring for abstraction of *minerals* must

give notice to the Minister who may impose conditions for the preservation of water.

The Act also imposes some duties on water undertakers. For example, and this is most important, an owner of land who proposes to build can require the undertaker to lay pipes for supply for domestic purposes : section 37. This is, of course, subject to payment of a rate, but apparently it does mean that no houses need ever be built without water " laid on ", though, no doubt, the scheme may be prohibitive in cost.

It will be seen that no adequate account of this Act, which comes into force on October 1, 1945, can be given in a short note. We have only sought to draw attention to its wide implications. It means, we think, that a new general requisition should be added to inquiries preliminary to contract or requisitions on title to the following effect : " Is there any agreement, notice, compulsory order or by-law made or given in accordance with the Water Act, 1945, which affects the property? "

Income tax—relief for expenses.—Attention may very briefly be drawn to the very technical Income Tax Act, 1945. This Act is designed to afford relief from tax upon expenditure which formerly was treated as capital expenditure and not, therefore, deductible. So, for example, on an industrial building one-tenth of the capital expenditure for construction may be allowed as an " initial allowance " : section 1 ; and one-fiftieth of the capital expenditure as an " annual allowance " : section 2. The assessment of the " life " of an industrial building is interesting. There is, then, a " balancing allowance " or a " balancing charge " which arises when on a sale or otherwise the interest in the industrial building comes to an end, *e.g.*, by determination of a lease : section 3. Where a building is sold before it is used, then the " expenditure on construction " is carried to the favour of the purchaser : section 5.

This part of the Act clearly calls for preliminary inquiry before contract. A purchaser should, before contract, know the extent to which, if any, the building gets any benefit under this Act. The definition of an industrial building is contained in section 8. It is important to note, in view of likely derequisition, the provisions relating to requisitioned land in section 12.

Part II deals with machinery and plant, but Part III provides allowances for searching for and opening up mines, oil wells, etc. Part IV concerns agricultural land and buildings. This short part contains the very important amendment that capital expenditure, incurred for the purposes of forestry or agriculture, on the construction of farmhouses, farm or forestry buildings, cottages, fences or other works made after April 6, 1944, may be allowed, after " the appointed day ", by way of allowance of one-tenth for the ensuing ten years, *but* expenditure on a farmhouse must not be disproportionate and will never be allowed up to more than one-third of the expenditure, and in other cases the apportionment will be such " as may be just " : section 33. The definitions are contained in section 34. Again, this will call for preliminary inquiry.

The appointed day is the day appointed by Parliament : section 68. There are, of course, numerous other provisions, but they are of a less purely conveyancing interest and do not seem to us to call for special preliminary inquiry. The shifting of the advantage of allowances for the purpose of tax with interests in land may involve a new technique in sales of land, and certainly there appear to be problems of apportionment which may not be easy. We are not aware that the day has been " appointed ".

A marriage not a marriage.—Although in the past the law of matrimonial causes has not been regarded as part of the province of this journal, marriage law is so essential to the conveyancer that we make no apology for referring to the most startling decision of recent years. In *Cowen* v. *Cowen,* [1945] 2 A. E. R. 197, the Court of Appeal held that a decree of nullity would issue to a woman who had been married a number of years but whose marriage had never been " consummated " owing to the use of contraceptives and *coitus interruptus.* It is important to notice two matters, first, that the decree was a decree of nullity, and secondly, that the circumstances under which the couple first lived made child-bearing peculiarly hazardous for Europeans and, therefore, provided some ground for the original agreement to use contraceptives. The wife had never agreed to the use of contraceptives after the circumstances had changed.

The essential principle on which the decision was based is that one of the chief ends of marriage is the procreation of children and if one party to the marriage artificially prevents insemination the marriage is frustrated and not consummated.

Perhaps, assuming the correctness of the decision, the most important issue that arises out of the case is the circumstances in which a petition could be defended on the ground either of delay or agreement. du Parcq, L.J. (who delivered the judgment of the Court) (at p. 200) said : " It may be that relief might properly be refused to a wife who over a long period consented to such imperfect intercourse as was here proved, and only objected to it at a later date, without being able to adduce any excuse or justification for her earlier consent. Each case must be dealt with on its own facts, in the light of established principle. . . . It is well settled that delay in itself is not a bar to relief ".

It would be to pretend to an unwarranted ignorance of prevailing social conditions to ignore the common use of contraceptives at all stages of marriage. It is not at all uncommon, we believe, for young couples to desire to " settle in " before starting a family. This decision seems to point to the introduction of " companionate marriage ", at least for a period of time, with the sanction of the law. It is true that a petitioner must make a request for normal intercourse, but it would be almost impossible to prove lack of good faith.

We have already observed that the decree is one of nullity, that is to say that for most purposes the decree operates to declare the marriage void *ab initio,* though in its inception the marriage is voidable. Indeed, the logical result of the decision would be that every marriage is voidable in its inception. But from a conveyancing point of view

it may be desirable to insert in marriage settlements some provision to cover nullity decrees. It is, indeed, early days to consider in detail what, if any, clauses would be appropriate. Nevertheless we feel that the position is not likely to stay where it is and conveyancers as well as others will have need to watch the developments with care.

Curiously enough another recent decision of not less general importance in matrimonial law is the recognition of "non-Christian" marriages as a ground for nullity of a future marriage. An Indian, having married in India in accordance with Hindu law and thereby contracted a potentially bigamous marriage, married an Englishwoman in England. Upon petition for nullity by the second "wife" it was held that, notwithstanding the "normal" rule that the only marriages recognised by the Divorce Court are monogamous, the decree could be granted. It was imperative to avoid confusion that marriages valid in one part of the Commonwealth should not be regarded as a nullity in another.

We are not sure that the law is as simple as that. In bigamy, for example, it is generally supposed that the first marriage must be monogamous to cause the second marriage to be an offence. Could it now be that the Hindu could marry twice in India without offence but to marry first in India and secondly in England would be an offence but not conversely? We would respectively suggest that the time has come when the fundamental characteristics of marriage according to law require reconsideration. The law largely comes to us from Ecclesiastical Courts whose jurisdiction is not acceptable to probably the majority of the community.

TENANCY AGREEMENTS FOR THE DURATION OF THE WAR WITH JAPAN: ORDER IN COUNCIL UNDER THE VALIDATION OF WAR-TIME LEASES ACT, 1944.

The Lord Chancellor wishes to draw the attention of landlords and tenants and their advisers to an Order in Council which has been made under the Validation of War-Time Leases Act, 1944, declaring the date of the end of the war with Japan for the purposes of certain tenancy agreements. For the purposes only of those tenancy agreements which refer (or are to be construed as referring) to the end of the war or of hostilities, or to the signing of an armistice, with Japan, or to the emergency (not being defined by reference to any Act of Parliament) occasioned by the said war and hostilities, the Order in Council declares the 15th August, 1945, to be the relevant date. The application of this Order is of limited effect; it does not apply to agreements in which the parties have specified an event not referred to in the Order (*e.g.*, the signing of a peace-treaty with Japan). Furthermore, the Order will not apply in cases where the context of the tenancy agreement otherwise requires, or where it is shown by admissible evidence that it should be otherwise construed.

The two classes of case most likely to be affected by the Order are:— (1) tenancy agreements which have been expressly made for the duration of the war against Japan, or until the end of the war or of

hostilities in the Far East, or until the end of the whole war or of all hostilities; and (2) certain tenancy agreements which refer to "the war" without specifying which "war" is meant (the war with Germany, or the whole war including the war with Japan). In this latter class of case, if the agreement was made after Japan entered the war, the effect of section 2 (1) of the Validation of War-Time Leases Act, 1944, is to require the agreement to be construed as referring to the whole war, including the war with Japan, unless it appears from the context, or either party shows, that the expression used was intended to refer to the European war only.

The Order in Council also declares, for the removal of doubt, that the date declared by the Tenancy Agreement (End of the War in Europe) Order, 1945 (namely, the 9th day of May, 1945), to be the date for the purposes of any tenancy agreement of the end of the war and of hostilities in Europe is also to be treated for those purposes as the date of the signing of an armistice with all or any of the States involved.

For the purposes of the Order in Council "tenancy agreement" has the same meaning as in section 2 of the Act, *viz.*, any lease or other agreement, whether entered into before or after the 3rd August, 1944, granting or providing for the grant of a tenancy, or varying any of the terms or conditions of a tenancy, and includes any agreement (whether in the form of a lease or not) "validated" by section 1 of the Act.

Lord Chancellor's Office,
24th August, 1945. House of Lords, S.W.1.

SHELLEY'S CASE AND THE PROPERTY ACT, 1925, s. 131.

By Frederick E. Farrer, one of the Conveyancing Counsel to the Court.

In the year 1937, in an article in the *Law Quarterly Review*, I submitted that had section 131 of the Law of Property Act stood *alone*, then a limitation in a conveyance of land or hereditament not for value executed after December 31, 1925, to "X and his heirs", must have given to X but a life estate, with equitable remainder necessarily contingent to that person as purchaser who at the death of X should turn out to be his heir at law (*a*).

But I submitted that owing to other sections of that Act (sections 60 and 130) this was not so; for that the Act must be construed as one whole, and so read, that section 131 must necessarily be limited in its application to the first of the two branches of the rule in *Shelley's Case*, in which the limitation of a freehold to the ancestor is followed by a limitation to a stranger, interposed between the limitation to the ancestor and the limitation to that ancestor's heirs, and cannot possibly cover the case of the second branch of the rule in *Shelley's Case*, where the limitation to the ancestor's heirs followed *immediately* on the limitation of the freehold to that ancestor.

(*a*) L. Q. R., Vol. 53, p. 371.

My submissions were controverted by Mr. Hargreaves in an article also in the *Law Quarterly Review* (*b*), of the existence of which article I did not know for some time after its appearance, and when I suggested a reply to it on my part, the learned editor did not desire a reply.

I am now given opportunity to deal again with the matter, and this more especially in view that some *dicta* of Vaisey, J., in a recent case, *Re McElligott*, [1944] Ch. 216, p. 218, are decidedly in favour of Mr. Hargreaves' contention.

I must say at once that if the Law of Property Act, 1925, had been passed in 1881 in place of the Conveyancing Act, 1881, and as to come into force as the last-named Act did, on January 1, 1882, I do not see how any one conversant with elementary conveyancing or the rule in *Shelley's Case* could have doubted that a limitation to " X and his heirs " gave the immediate fee simple to X under the second of the two branches of the rule in *Shelley's Case*, *viz.*, that, where the limitation to the ancestor's heirs follows *immediately* on the limitation of a freehold estate to that ancestor : for this reason, that the taker took at common law, and could not at common law possibly take, *under the mere nomination of himself as taker*, an estate by any possibility exceeding a full life estate continuing during the whole of his life. To enable him till 1882 to take the fee simple under the conveyance, the estate had to be expressly given in words not only to himself, but also in words to totally other persons, *viz.*, his heirs (*c*); and most certainly the very enunciation of the second branch of the rule in *Shelley's Case* includes in words such a limitation, as operating by virtue of that rule, to give X the fee simple.

But the introduction in 1882 by the Conveyancing Act, 1881, s. 51 (*d*), of statutorily authorised words of equivalent value as " in fee simple " for " his heirs ", " in tail, in tail male, or tail female " for " the heirs of his body ", " heirs male of his body ", and " heirs female of his body ", has tended to obscure the fact that the taker could not *at law*, by the mere nomination of himself as taker, take an estate exceeding an estate for his own life. It is only by the overwhelming authority of statute that a limitation to " X in fee simple " gave him the fee simple, and those *exact* statutory equivalents had of course to be observed strictly : a limitation to " X in fee "—omitting " simple "—give him only a life estate (*e*).

We will now first endeavour to show that under the Law of Property Act, 1925, s. 131, *standing alone*, a voluntary conveyance by deed to

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(*b*) Vol. 54, p. 70, January, 1938. Anyone reading this article would have assumed that I had argued that a voluntary conveyance to A and his heirs would still give only a life estate; what I argued was that if s. 131 stood *alone* that would have been the case.

(*c*) The expression of the word " heirs " was essential, and could not be paraphrased, though they might be satisfied by express importation of them by way of reference to another conveyance: Litt. s. 1, Co. Litt. 9b, *Grant* v. *Edmondson*, [1930] 2 Ch. at p. 254.

Of course, where the taker already held the legal fee as in the case of A and B, two joint tenants in fee, and A releasing to B, the proper mode of conveyance from one to the other, words of limitation were not required, for joint tenants are seised not only " per my ", but also " per tout ": Litt. s. 288, Co. Litt. 193 (a).

So also where the taker already holds the legal fee but wrongfully against the grantor, as in the case of disseisee releasing to the disseisor words of limitation were not wanted: Litt. ss. 467, 519, 520; Co. Litt. 274 (a), 296 (b).

(*d*) C. A., 1881, s. 51, now embodied in L. P. A., 1925, s. 60 (4).

(*e*) *Re Ethel and Mitchells and Butlers' Contract*, [1901] 1 Ch. 945.

"X and his heirs" would have fallen within that section and consequently conferred on X's heir, whoever he might turn out to be, for he could not be ascertained till X's death, an equitable contingent remainder, and then afterwards deal with the *other sections* of the Act showing that this cannot be so.

The Law of Property Act, 1925, applies only to England and Wales and to no part of Ireland (section 209 (3)). By section 131 it is enacted: "Where by any instrument (*f*) coming into operation after the commencement of this Act (*g*) an interest in any property (*h*) is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for the section would, under the rule of law known as the Rule in *Shelley's Case*, have operated to give to that person an interest in fee simple or an entailed interest (*i*), such words shall operate in equity as words of purchase and not of limitation, and shall be construed and have effect accordingly, and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person or persons shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act".

Now when the Legislature refers to the rule of law known as the rule in *Shelley's Case*, it seems reasonable to refer to the classical report of that case, to see what was the exact rule there laid down and how that case arose. And on inspection we shall find how very strong the rule was, and that it was hardly possible for the manifest intention of the draft to get out of the rule. The rule is not stated directly by the Court itself, but is found in the argument of the counsel for the defendant, Popham, afterwards Chief Justice, Cowper and Coke, successively Chief Justice of the Common Pleas and of the King's Bench.

The facts of the case as appearing in the Pleadings and Report given in Thomas' edition of Coke's Reports may be stated for our purposes as under.

Edward Shelley had survived his wife *Joan*, and had had by her issue as below stated. He was tenant in tail of the manor of *Findon*, in the county of Sussex, though how he had so become is not stated (*k*).

He was also tenant in tail of the manor of *Barhamwick*, in the same county, the manor in question in the litigation, in the following circumstances.

By Crown grant of May 14, 32 Henry VIII, the King had granted this manor to *Anne Cobham* (since deceased) for her life, with remainder to said *Edward* and *Joan Shelley*, his wife, and the heirs of their bodies, with remainder to said *Edward* in fee simple (*l*).

Edward having survived *Joan*, and having issue by her, was tenant

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(*f*) "Instrument" undoubtedly includes a will and codicil (s. 205 (1) (ii) and (viii)) (as is also obvious from the use of the word "issue"): *Re McElligott*, [1944] Ch. 216.

(*g*) The end of 1925, s. 209 (2).

(*h*) Defined s. 205 (1) (xx); but the rule in *Shelley's Case* applied only to freehold and copyhold hereditaments.

(*i*) Defined s. 130 (1) as an interest in tail, tail male, tail female, or tail special.

(*k*) Pleadings, 1 Coke 90 (b).

(*l*) Pleadings, 1 Coke 89a.

in tail of this manor, and had granted it to one *Belchamber* for a term of years (*m*).

At the time of his suffering the recovery hereinafter mentioned of both manors *Findon* and *Barhamwick*, the position of his issue by his then deceased wife *Joan* was as follows.

Henry, the elder son of *Edward* and *Joan* had recently died, leaving issue by his wife *Anne* a daughter *Mary* (who would be both presumptive heir general and heir of the body, though not heir *male* of both *Edward* and *Joan*), and also leaving his wife *Anne* at his (*Henry's*) death enceinte of a child, which was born after the death of *Edward*, and who was the defendant *Henry Shelley* the younger.

Edward Shelley also had by *Joan* a second son *Richard*, the plaintiff, and at the moment of Edward Shelley's death the actual heir *male* of the body of both his father and mother (*n*). In this position, and obviously intending, whatever else he intended, to prefer *Richard* his son to his granddaughter *Mary*, and if the child of which *Anne* was then enceinte proved to be female, to that granddaughter also, *Edward* entered into the usual covenant by *one single deed* to suffer a recovery of *both* manors *Findon* and *Barhamwick*, October 6, 1 Ph. & M.

The uses declared in this deed of covenant to which the recovery was to enure, were as to the manor of *Findon*, to the use of himself Edward Shelley and "the heirs *male* of his body"; but as to the manor of *Barhamwick*, the uses to which the recovery was to enure were: to the use of himself *Edward Shelley* and his assigns during his natural life, without impeachment of waste, with remainder to the use of three persons for the term of twenty-four years from his death, and after the twenty-four years ended, to the use of the heirs male of the body of him, *Edward*, and of the heirs male of the body of the said heirs male (*o*).

Edward Shelley died on October 9, 1 & 2 Ph. & M., on the very day that judgment for the recovery was given, and *Henry Shelley* the younger, the younger child of Henry and Anne, was born on December 4 of that year (*p*).

On the cesser of Belchamber's lease of *Barhamwick*, *Richard*, the younger son of *Edward* and *Joan*, entered on *Barhamwick* October 9, 20 Elizabeth, on whom *Henry Shelley* entered, whose entry was held justified in *Richard's* action of ejectment.

Richard's argument was that he took as purchaser, as being the heir male of the body of Edward in existence at the moment of Edward's death, and that so taking he could not be divested by the later birth of *Henry*.

But the argument of defendant's counsel (*q*) was upheld by the

(*m*) Pleadings, 1 Coke 91a.

(*n*) Pleadings, 1 Coke 89 (b).

(*o*) Pleadings, 1 Coke 90 (a) *et seq.* Observe how strong an illustration this case is of the fact that the manifest intention can hardly ever prevail against the rule. (1) In the deed to lead the uses of the recovery *Findon* is to be limited clearly to Edward in *tail male*. (2) In the *same deed Barhamwick* is expressly to go to Edward for his life only. (3) His life estate is to be without impeachment of waste: tenant in tail holding as he does the inheritance could not be impeachable. (4) The additional words "and of the heirs male of the body of the said heirs male"

(*p*) Pleadings, 1 Coke 92 (b).

(*q*) 1 Coke 104 (a) and 100 (b), who were Popham, Cowper and Coke.

Court (italics my own). "It is a rule in law when the ancestor by any gift or conveyance takes an estate of *freehold*, and in the same (*r*) gift or conveyance, an estate is limited either *mediately* or *immediately* to his heirs in fee or in tail (*s*), that always in such cases 'the heirs' are words of limitation of the estate and not words of purchase."

Observe that the rule as enunciated in its very words includes two branches, both conditioned by the fact that the ancestor must take an estate of freehold: *first branch*, where between the ancestor's freehold and the limitation to the heirs of the ancestor is interposed a limitation to a stranger; *second branch*, where the limitation to the heirs of the ancestor *immediately* follows that of the freehold to the ancestor.

Observe that the words are that the ancestor must take an estate of "*freehold*", not expressly "for life with remainder etc." or similar words: every lawyer of that time knew that unless a man was expressly restricted to taking an estate for years, every conveyance to him by name gave him by his mere *nomination* as taker an estate for his life, though his life estate might be determinable by a specified event during his life, and *could not possibly give him by his mere nomination*, more than an estate for his own life, all of which we shall presently prove.

The fact that the ancestor's estate must be one of *freehold*, and not for a term of years, is emphasised a little later in the same argument.

"So inasmuch as in this case *Edward Shelley* took an estate of freehold, and afterwards an estate is limited to his heirs male of his body, the heirs male of his body must of necessity take by descent and cannot be purchasers, otherwise is it where an estate for years (*t*) is limited to the ancestor, the remainder to another for life, the remainder to the right heirs of the lessee for years, there his heirs are purchasers." "Freehold" in the rule in *Shelley's Case* is contrasted with a term of years or chattel interest, not with "copyhold": the rule applied equally to copyholds as freeholds (*u*).

The reason why the ancestor's term of years, however long it were, would not bring in the rule of *Shelley's Case*, is, I apprehend, this: that the ancestor was never in the feudal seisin of the land; his possession under the term was the seisin of the freeholder subject to the term (*a*); moreover, when the first branch of the rule was, about *tempore*

(*r*) The same gift: see Fearne 70 to 72.

(*s*) It is enough to create a tail special, that there be a mere possibility that the specified heir be born, *e.g.*, A never having had issue by his wife died devising a reversionary estate to his wife for life remainder to the heirs of her body by him (A) remainder over; it was holden that she took a tenancy in tail after possibility of issue extinct, for because of the possibility she might have a child by him born within nine months of his death: Smith, Executory Interests, s. 471b, citing *Platt* v. *Powles*, 2 Maule & Selwyn 65.

(*t*) 1 Coke 104a. This passage is of course completely established law: Co. Litt. 319b; Fearne 43, 44, 49, 50, 51, 535; *Harris* v. *Barnes*, 4 Burrows 2157; *Milman* v. *Lane*, [1901] 2 K. B. at p. 749; *Van Grutten* v. *Foxwell*, [1897] A. C. at p. 675, and is so, though the term be for years if the ancestor so long lives, which of course gives a mere chattel interest: Fearne, 44, 54, 536, citing *Else* v. *Osborn* and *Harris* v. *Barnes*.

(*u*) Fearne 60 *et seq.*

(*a*) To get curtesy of his deceased wife's estate, a husband had to establish that he had obtained seisin in deed during the marriage, except only in certain cases in which no *legal* opportunity had arisen during the coverture; physical impossibility was not enough. Hence if in the reign of Henry VIII a father seised in fee of lands in Yorkshire, and in personal occupation of them, had died one day, and his daughter, his

Edward II, first established by judicial decision, the termor had no sort of even inferior estate in the land; he did not obtain even what could be called an inferior estate therein till long after, when he was enabled to falsify the freeholder's recovery (*b*).

The reader will observe that as stated there are two branches of the rule, both of which branches demand an estate of freehold in the ancestor. The first where between the freehold to the ancestor and the expressed gift to his heirs is interposed a limitation in favour of a stranger. *The second where the gift to the heirs follows immediately on the ancestor's freehold.*

It is now necessary to turn to the case of *Re McElligott* (*c*) and the *dicta* in that case of Vaisey, J. In that case a testator who died in the year 1941 made his will in the year 1936, giving his residuary real and personal estate to his wife " and her heirs for her and their use and benefit absolutely and for ever ". He had no real estate. Now of course though the rule in *Shelley's Case* did apply to the case of devise of freeholds or copyholds by will, it was never necessary in case of a devise and in order to pass the fee simple, to give to the deviseee " and his heirs ", as it would have been till 1882 in a gift or conveyance *inter vivos*; though until the Wills Act, 1837, came into operation, a devise merely to X, without further indication that he was to take in fee simple, would have passed to him merely a life estate, in analogy to the case of a conveyance *inter vivos*. Moreover, the rule in *Shelley's Case* applied only in regard of freehold and copyhold hereditaments. The learned Judge had of course no difficulty in holding that the widow took the personalty absolutely. Unfortunately, as I think he was moved to utter the following *dicta* in relation to a devise of real estate and section 131 of the Law of Property Act, 1925, I must give them in full without an attempt at a paraphrase.

" Even if this had been a devise of real estate I am not by any means convinced that the section would have had any application to it, for it seems to me that in a limitation to A and his heirs no interest is ' expressed to be given ' to the heirs."

" Nor in my judgment was it ever the case that such a limitation vested the fee in A under the rule in *Shelley's Case*."

" The rule as I understand it dealt with the case of there being two limitations, one a limitation to the ancestor, and then subsequently (usually after intervening limitations) another separate limitation to the ancestor's heirs . . ."

" I think it correct to say that the effect of the rule was that a limitation expressed or implied (*d*) to A for life, with remainder to

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heir living in Essex, had died the next day, then unless someone had entered to her use after her father's death and before hers, her husband would have failed; but had the father's land been in occupation of a tenant for a chattel interest he would have succeeded, for the tenant's occupation was the seisin of the freeholder. See my article on Tenant by the Curtesy of England, L. Q. R., Vol. 43, pp. 104, 105, 106.

(*b*) See the history of the legal position of a termor for years given in Williams' Real Property, Introductory Chapter.

(*c*) [1944] Ch. 216.

(*d*) *E.g.*, where A seised in fee covenanted to stand seised of Blackacre to the use of his heirs male begotten or to be begotten on the body of his (A's) second wife. The son of the second marriage took his father's estate tail male by descent, his father by implication or resulting use being given an estate for his own life, so that the rule in *Shelley's Case* could apply: *Pybus* v. *Mitford*, 1 Ventris 372, Fearne 40 *et seq.*, Butler's note [*ib.*].

his heirs, was in law to be regarded as equivalent to a limitation to A and his heirs, and I think that this last-mentioned form of limitation was apt to vest the fee in A not under the rule but independent of it."

"I do not agree with the contrary view (if such it be) in the passage to which my attention was drawn in *Fearne on Contingent Remainders*, 10th ed., Vol. 1, p. 77 (*e*): see also *Williams and Eastwood on Real Property*, 1933, pp. 211—216. In my judgment, therefore, no interest is by the will 'expressed to be given' to the heir nor would the rule in *Shelley's Case* ever at any time or in any circumstances have applied to this gift."

Now in my article in the *Law Quarterly Review* I did submit, and I repeat the submission, that it may prove necessary in certain cases arising under the 1925 Legislation in order to avoid appalling results, for the Courts under the guise of construing that legislation, deliberately to misconstrue it. But that the principles of our ancient and lucid common law should be distorted and misstated, in order to square with the views thereof held by the late learned author and dictator of the 1925 Legislation, if and when he misunderstands those principles, opens a vista of horror and anarchy in our law too ghastly to contemplate with equanimity. Fortunately, assuming I am right on my contention on section 131 standing alone, the awful results that would otherwise have ensued are (as I later submit) obviated by sections 60 and 130.

The true question surely is, not when or how it became first established, in order by a conveyance *inter vivos* to give A, a subject, the greatest tenancy which a subject can hold, *viz.*, a tenancy in fee simple, that it was absolutely necessary in words at least to give that estate not only to himself but also to his heirs, nor when or how it first became established that in such a gift the heir took no interest whatsoever otherwise than by possible descent (*f*). *But the crucial point is what are the exact words used in the statement of the rule in Shelley's Case.*

Lawyers of that day knew very well that by his mere nomination as taker, the taker took at the utmost an estate for his full life and could not possibly take more, and consequently they speak of (1) the ancestor taking an estate of "*freehold*" simply—not "for life or lives with remainder, etc.", and (2) an estate being afterwards *limited*; (3) mediately or *immediately* to that ancestor's heirs.

They also very well knew that a limitation to A and his heirs had the precise legal signification of a limitation to A for his life with remainder to his heirs (*g*).

That a limitation of land to A simply could not *by his mere nomination as the grantee* give him more than an estate for his life

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(*e*) I thought it sufficient in my article in the L. Q. R. to refer to this passage in Fearne's great work. Had I conceived that anyone would have seriously impugned his authority, I would then have added further authority as I shall presently do.

(*f*) This must have been established long prior to Littleton's time, *circa.* A.D. 1460, (see Litt. s. 1), and as I believe, well prior to A.D. 1200.

It will be remembered that there was no general power of legal devise of land till nearly 100 years after Littleton's time; in his time only land in a city whose special custom admitted devise was devisable as also perhaps land in Kent subject to the custom of gavelkind.

(*g*) *Frogmorton* d. *Robinson* v. *Wharrey*, Wilmot Ca. and Op. 354, 362, and other authorities cited below.

is clear (*h*). That life estate might indeed be made potentially terminable during his life, as, *e.g.*, limitation to A till he returns from Rome, during his or her widowhood or her spinsterhood, during the lives of X Y and Z and the survivor of them; and if there was a limitation to A's heirs following, the fact that the freehold in him by nomination as grantee might determine in his life, did not preclude his taking the fee simple (*i*) under the rule in *Shelley's Case*.

With profound deference, I do not understand the learned Judge's *dictum* that in a limitation to A and his heirs no interest is "*expressed* to be given" to the heirs.

How otherwise can an interest be *expressed* to be given to A's heirs? There are perhaps a few rare cases when there is an intervening freehold limitation to a stranger, between the freehold gift to A and the words in favour of his heirs; and yet there have been such additions to the latter words as to exclude the rule in *Shelley's Case*: here the heirs take by purchase, and surely this is under a limitation to them. But there is one case in which though the words in favour of A's heirs immediately follow the freehold which A takes by mere nomination as grantee, his heirs took as *purchasers*, and not as by descent from A.

If land was conveyed to A to hold for the life of any *other* person or persons, if A died leaving the *cestui que vient* surviving, then at law A's estate ceased absolutely with his own death; anybody who was in possession at A's death or who could first get into possession could hold for the rest of the life or lives of the *cestui que vient*, and he was called the general occupant (*k*). But in course of time a special occupant might be allowed to be named in the person of A's heirs, and then if the land were limited to "A and his heirs during the lives of X Y and Z and the survivor of them" if A died living any of those lives, his estate at common law ended at his death, and his heir took for the rest of the lives as *persona designata*, *i.e.*, as purchaser under the terms of the gift, and not as by descent from A. Accordingly, had A in his lifetime covenanted for himself and for his heirs to pay M £x: in an action by M against A's heir the latter could at common law successfully plead "*rien per descent*": it required the Statute of Frauds passed long after the date of *Shelley's Case* to make the interest the heir took assets of the ancestor A (*l*).

Again, with respect, I am unable to follow any suggestion that the fact that A took the fee simple under a limitation to "A and his heirs" was due to some totally independent rule, and not to the rule in *Shelley's Case*.

What is this independent, and if independent nameless, and superfluous rule? (*m*), and what writer of authority has ever hinted at its

(*h*) Litt, s. 1.

(*i*) Fearne, 12, 13, 30 to 33; *Curtis* v. *Price*, 12 Ves. at p. 99; Smith, Executory Interests, s. 462; Perkins, s. 337; Park on Dower, 76; Williams, R. P., at the end of the chapter on the rule in *Shelley's Case*.

(*k*) Co. Litt. 41 (b); Touchstone, 108; Challis, 2nd ed., 327 *et seq.*, if the estate was in tenancy it would come to the tenant.

(*l*) Co. Litt. 41b, note 5; Challis, 2nd ed., 327; *Doe* d. *Blake* v. *Luxton*, 6 T. R. 289, pp. 291, 292; *Northern* v. *Carnegie*, 4 Drewry, at p. 590.

(*m*) I am reminded of a story told in my youth at Oxford about Benjamin Jowett, the great Master of Balliol. He was walking one day, as was his wont, with a favourite pupil. The pupil said, "Master, the other night Mr. X was arguing most strongly that the Iliad was not written by Homer." The Master replied, "Mr. X is perfectly correct, that poem was written not by Homer, but by another person of the same name."

existence until the Law of Property Act, s. 131, had been passed? But even if the existence of such an independent rule could be proved, inasmuch as in words the second branch of the rule in *Shelley's Case* also covers and enunciates this independent rule, this second branch must surely be considered as *prima facie* together with the first branch within the rule as referred to in section 131.

Counsel for the defendant in *Shelley's Case* were arguing what the common law was then at their time, regardless of whether or not they were able to produce a recorded judicial decision in favour of any part of the rule which they enunciated.

In truth, that a limitation to A and his heirs unquestionably gave him the fee simple, a truth established in Littleton's day (*n*), must have been established as law so long before his time as to preclude discovery of judicial decision establishing it; the heir-apparent had by about A.D. 1200 lost all such limited power of vetoing alienation by his ancestor as indeed remained to him in Glanville's day, *tempore* Henry II (*o*).

Though this was so, we do still find as late as the reign of Henry VI recorded judicial decisions, of fruitless attempts to get out of the rule when the limitation is expressly to "A for life with remainder to his heirs"; no doubt based on the expressed intention of the grantor that A is to take for life and no longer (*p*). But we can probably ascertain the first establishment recorded by judicial decision of the first branch of the rule in the reign of Edward II (*q*). That the expression by counsel of the second branch of the rule was quite deliberate we cannot doubt.

In the first place the very deed that led the uses of the recovery to be suffered of *Barhamwick*—to which the case related—led also the uses to be suffered of the recovery of *Findon*, and those uses were to "Edward Shelley and the heirs male of the body". In the second place, so far as *freehold* limitations are concerned, the facts in *Shelley's Case* presented an illustration as to *Barhamwick* itself; of the second branch of the rule, the only intermediate interest to a stranger was for the term of twenty-four years, a mere chattel interest.

This distinction might have proved to be of importance had different events happened. Supposing instead of the intermediate limitation being for a term of years only, it had been a freehold limitation, then had Edward Shelley continued to live, and had married again, and died survived by the stranger holding such freehold, and by his second wife, then the second wife could not have had dower, for the freehold of the stranger would have prevented the freehold (the life estate) of Edward taken under his nomination as grantee so coalescing with the estate in tail male of Edward under the limitation to the heirs male of his body, as to give him, Edward, at his death, an estate in tail male as in possession. Whereas in the same circumstances but substituting a term of years as the intermediate interest, the second wife

(*n*) *Circa* 1460 A.D.

(*o*) See my prior article, L. Q. R., vol. 53, p. 373.

(*p*) Rolle's Abr., Vol. II, p. 417, pl. 3 and 4. See Wilmot, Ca. and Op., pp. 362, 363, cited later.

(*q*) Fearne, p. 85 *et seq.*

would have had dower, for Edward's estate would have been a tail male in possession opening to let in the term at his death (*r*).

The two profoundest and most accurate writers in our law are, as I apprehend, *Littleton* and *Fearne*. *Fearne* has no doubt that a limitation to "A and his heirs" gives him the fee simple by the rule in *Shelley's Case*. Let us hear him.

Fearne knows nothing of this independent rule. In his great work Fearne divides all contingent remainders into four species (*s*); the fourth species is given as follows (*t*). "Where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made, as if a lease be made to one for life remainder to the right heirs of J. S.: now there can be no such person as the right heir of J. S. until the death of J. S. (for *nemo est hæres viventis*) which may not happen till after the determination of the particular estate by the death of tenant for life, therefore such remainder is contingent".

Having said this, then at the middle of page 27 he begins to state an exception to the fourth species of contingent remainder as introduced by the rule in *Shelley's Case*, and he continues this discussion of this exception for 181 pages from pages 27 to 208. Throughout these 181 pages it is clear that the rule and only rule which Fearne is discussing is the rule in *Shelley's Case*, though he is not always mentioning by that very name the rule which he is discussing. At page 32 he specifically mentions *Shelley's Case* at the bottom of that page, and on the next page in his discussion on whether that rule applies where the ancestor's freehold is potentially terminable, he concludes as the better opinion that (italics my own) it is "a general rule that whensoever the ancestor takes *any* estate of freehold whether it be or be not such as may determine in his lifetime, and there is afterwards in the same conveyance an unconditional limitation to his right heir or heirs in tail (*either immediately without the intervention of any mean estate of freehold* between his freehold and the subsequent limitation to his heirs, or mediately, that is with the interposition of some such mean estate) there such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor, and does not remain in contingency or abeyance; with this distinction, that where such subsequent limitation is *immediate* it then becomes executed in the ancestor forming by the union with his particular freehold an estate of

(*r*) Perkins, ss. 333, 336; *Bates* v. *Bates*, 1 Lord Raymond 326, 1 Salkeld 254; Park on Dower, 76 *et seq.*; Rolle Abr. 1, p. 678, pl. 7 and 8.

One gathers that during the term her third of the land could not be assigned to her by metes and bounds, but that if the term was at a rent, or held on trusts the terms of which did not exhaust the rents and profits, then that she would be entitled to a third of the rents and profits, or surplus rents and profits. The term created by Edward Shelley in remainder on his death was a *vested* not contingent interest in the termors, and was limited in priority to the limitation to the heirs male of his body, the only limitation which, coupled with his preceding freehold, could give him an estate in tail male. So it seems clear that *Edward* could not have barred that term by suffering a later and second recovery.

(*s*) Fearne, pp. 5 to 9. I have sometimes wondered whether a fifth species might not be added, but as Fearne does not expressly mention this of course I do not go into this case. The case is where the very subject-matter of the gift is contingent, as where *Whiteacre* and *Blackacre* are limited to A for life with remainder as to one of the two, not specifying which, to B. Here must not B have elected during A's life, for the contingent remainder not to fail at common law? Perkins, s. 76, does not seem addressed to this point, but to a husband's election binding the wife. See The Touchstone, 250, 251.

(*t*) Fearne, p. 9.

inheritance in possession". Then at page 209, beginning a fresh section, he says, "Having now discharged the degree of attention to the much agitated rule in *Shelley's Case* which, etc." In these 181 pages about the rule occur this passage beginning at page 77 (italics my own). "For in a limitation to a man and his heirs (*a*), the words 'his heirs' operate to vest in him *another* and *further estate* than he would have taken without them, *viz.*, *the fee*, which they superinduce upon the estate for life given him by that part of the limitation which is expressly directed to himself. This is well exemplified by Mr. Justice Blackstone in his argument in *Perrin* v. *Blake* below cited where he says "that in the creation of an estate in fee or in tail by a gift to A and to his heirs for ever, or to A and to the heirs of his body begotten, the first words (to A) create an estate for life, the latter (to his heirs or the heirs of his body) create a *remainder* in fee or in tail which the law to prevent an *abeyance* refers to and vests in the ancestor himself, who is thus tenant for life, with an *immediate remainder* in fee or in tail, and then by the conjunction of the *two estates, or the merger of the less in the greater*, he becomes tenant in fee or tenant in tail in possession."

Of course to give a freehold to A it has never been necessary to express that he is to take for his life (*b*).

We give a few instances: a limitation "to A and B and the heirs of B" seems without doubt, as there are words of severance, to give B survives A he becomes at once seised in fee in possession, if he predeceases A, A is now sole tenant for life with remainder to B in fee (*c*).

A limitation to "A and B, equally or in equal shares, and to the heirs of B" seems without doubt, as there are words of severance, to give B a vested fee simple in a moiety, and to give A a life estate in the other moiety, with a contingent remainder thereon to the heir of B as purchaser (*d*).

A limitation to "*Roburge* and to the heirs of *John de Mandeville* her late husband on her body begotten", she in fact, having by him issue *Robert* and *Maude*, gave *Roburge* but an estate for life, on her death the estate vested in *Robert* in tail as purchaser, and on Robert's death without issue the estate came to *Maude* in tail as if it had been limited to her father *John de Mandeville* in tail (*e*).

John Robinson (*f*) being seised in customary fee of a copyhold held of the manor of Hemingborough, Yorks, and intending to marry *Mary*, in A.D. 1720 surrendered the same "to the use of Mary and the heirs of their two bodies lawfully to be begotten and for default of such issue to the use of the right heirs of said *John Robinson*". The marriage took place, and Mary was admitted A.D. 1720, according to the tenor of the surrender. *Mary* died in A.D. 1735, leaving a son of the marriage, *John* (the younger), born in A.D. 1722, who died in 1745,

(*a*) Fearne, 77. *Frogmorton* d. *Robinson* v. *Wharrey*, Wilmot Ca. and Op. 354, 362; Litt. ss. 1, 285, cited *infra*.

(*b*) Litt. s. 1.

(*c*) Litt. s. 285.

(*d*) Preston, Estates, I, p. 341.

(*e*) *Mandeville's Case*, Co. Litt. 26 (b). A late illustration of this last position will be found in *Re Mountgarret*, [1919] 2 Ch. 294.

(*f*) *Frogmorton* d. *Robinson* v. *Wharrey*, Wilmot Ca. and Op. 354. This case was decided in A.D. 1770, and reported 3 Wilson 125 and 144. Wilmot's Cases and Opinions were first published with a memoir of his father by the Chief Justice's son in A.D. 1802.

leaving his only son the plaintiff—and also leaving her husband J. R. (the elder) surviving. If the limitation gave *Mary* an estate tail (*g*), then her husband would have been, according to the custom of the manor, tenant by curtesy. J. R., the elder, continued in possession till 1746, when he surrendered the copyhold to the defendant Wharrey in customary fee; the defendant was admitted and had continued in possession ever since. J. R. the elder died in 1767.

It was argued for the plaintiff that his grandmother *Mary* took under *Shelley's Case* an estate tail which had descended on him. But Wilmot, C.J., delivering the unanimous judgment of the Court, held that the rule in *Shelley's Case* had no application; no freehold had been given to J. R., the elder, and the heirs *expressed* to take must be not only heirs of the body of the wife but also of the husband, but *nemo est hæres viventis*, nor could it be said J. R. the younger must necessarily be heir of the body of both parents. Suppose two sons at the death of the wife, and the elder to predecease the father without issue, then the father to die, the younger son fulfils both parts of the description, whereas at the mother's death the elder fulfils only one part thereof. Consequently the words must be taken as words of purchase. Accordingly, the Court held *Mary* to have but a life interest, with contingent remainder upon her death to the heirs of the body of both herself and her husband, which failed in the then state of the law (*h*), by not vesting during or *eo instante* with, the expiration of the only particular estate, the life estate of Mary. Accordingly, judgment for the defendant.

The Chief Justice (pp. 362 and 363) cites the previous cases of *Lane* v. *Pannell* and *Gossage and Taylor* as authority to show that where the limitation is to the heirs of the body of husband and wife, and no freehold estate is limited to the husband, they do not give an estate tail to the wife, but are words of purchase, and continues : " The only difference between those cases and this is, that the estate is there limited to the wife for life, in express words, and after her decease to the heirs of the body of the husband and wife begotten, whereas the estate is limited here, to the wife and the heirs of their bodies begotten; at first view it looks more like an intentional contingency in one case than the other; but upon legal principles they must have the same effect, for an estate limited to A for life, and after his decease to the heirs of his body, *have exactly the same legal operation as to A and the heirs of his body*; and therefore if they will not give an estate tail to the first taker in the one case they will not in the other, and the reason equally applies to both ".

If I am in error in submitting that a limitation to " A and his heirs " in a voluntary deed executed after 1925 would have fallen within the Law of Property Act, 1925, s. 131, had that section stood *alone*, then I conceive that I err with Littleton, Popham, Cowper and Coke, the enunciators of the rule in *Shelley's Case* or one of them, Blackstone, Fearne and Wilmot, C.J., and the Court of Common Pleas.

The importance of resisting temptation to distort the lucid principles of the common law in order to get out of any difficulty caused by any

(*g*) As the plaintiff contended, and consequently on the plaintiff's contention, neither he nor his father could have entered till the death of J. R. the elder.

(*h*) The Contingent Remainder Act passed in 1877 only.

section of the 1925 Legislation cannot be exaggerated, and must be the excuse for the length of this article.

Assuming that I am right in saying that if section 131 stood *alone*, a voluntary conveyance to " A and his heirs " would fall within that section. Yet, as it is elementary that a statute or any other document must be read as a whole, it seems clear that, having regard to sections 60 and 130 of the Act, section 131 must be read necessarily as applying only to the first of the two branches of the rule in *Shelley's Case*, *i.e.*, to the case where a limitation to a stranger is interposed between the freehold to the ancestor and the limitation to the ancestor's heirs.

The Law of Property Act, 1925, s. 60, enacts, sub-section (1) : " A conveyance (*i*) of freehold (*k*) land to any person without words of limitation, or any equivalent expression (*l*), shall pass to the grantee the fee simple or other the whole interest which the grantor had power to convey in such land, unless a contrary intention appears in the conveyance ". Sub-section 4 : " The foregoing provisions of this section apply only to conveyances and deeds executed after the commencement of this Act :" (*m*).

" Provided that in a deed executed after December 31, 1881, it is sufficient—(a) in the limitation of an estate in fee simple, to use the words ' in fee simple ', without the word ' heirs '; (b) in the limitation of an estate tail, to use the words ' in tail ' without the words ' heirs of the body '; and (c) in the limitation of an estate in tail male or in tail female, to use the words ' in tail male ' or ' in tail female ', as the case requires, without the words ' heirs male of the body ', or ' heirs female of the body ' ".

This proviso repeats section 51 of the Conveyancing Act, 1881. It will be noticed that on section 60 of this Law of Property Act, 1925, standing *alone*, it would have been sufficient to pass a fee simple or create an estate tail by the use of " fee simple " or " in tail " alone, and that this proviso cannot be limited in scope to conveyances executed between the end of 1881 and the end of 1925; for by the commencement of sub-section (4) it is expressed that the section applies only to conveyances executed after 1925, and accordingly that the proviso would have been wholly unnecessary to conveyances executed between the ends of the years 1881 and 1925, for section 51, C. A., 1881, would have applied. We have then a clear indication by the proviso that a conveyance made to A and his heirs may still be used to pass the fee simple (*n*), and a conveyance creating an estate tail, etc., may still be made by conveying to " A and the heirs of his body ". Indeed, if an estate in tail, tail male, tail female, or in special tail is to be *created* after the end of 1925, the old words " heirs of the body " or " in tail ", " heirs male of the body " or " in tail male ", " heirs female

(*i*) " Conveyance " excludes a will or codicil (s. 205 (1) (ii)).
(*k*) Copyholds were enfranchised in 1925.
(*l*) The equivalent expression is given in the proviso to s. 60 (4), and was given in the same terms in C. A. 1881, s. 51.
(*m*) The end of 1925.
(*n*) Though by s. 60 (1) it would not now be necessary to use either the words " his heirs " or " in fee simple ".

of the body " or " in tail female ", of the propositus or propositi, *must* still be used, as is made very clear by section 130 (1) of this 1925 Act.

It follows then as I submit that, assuming I am right in my argument that a voluntary conveyance to " A and his heirs " would have fallen within section 131 standing *alone*, that section must necessarily be limited in application to the first branch of *Shelley's Case*, where there is an intermediate limitation to a stranger, and cannot possibly apply where the limitation to the heirs immediately follows that of the freehold to the ancestor. There is no other way, so far as I can see, of reconciling the three sections.

In conclusion I should like to acknowledge the great assistance which I have received from my friend Mr. Harold King, of Lincoln's Inn, in verifying and searching for authorities, and for valuable suggestions, in relation to this article.

WAR MEMORIALS.

By BERTRAM B. BENAS, B.A., LL.B., of the Middle Temple, Barrister-at-Law.

The end of a great war has always in the past been followed by a movement for the establishment of war memorials of one kind or another, and there seems to be no reason why the present war should prove an exception. In many, if not in most, cases war memorials involve a setting up of trusts for their maintenance, and as the projects may take innumerable forms it becomes virtually impossible to prepare a single draft which, in anything but framework, can be made adaptable to the various schemes. It may, however, serve to indicate certain broad principles which must be borne in mind in preparing legal machinery for such schemes and to note the pitfalls which beset the designer.

In the first place it is a prerequisite to ascertain whether the project can be regarded as definitely within the ambit of what has been decided to be in the legal sense of the term a charity. This is essentially the case if the project appears to be outside the ambit or is of the borderline type which the present writer has described as " quasi-charities ", considered at length in an article under that title in the *Conveyancer and Property Lawyer* (N.S.), Vol. 9, pp. 67–71, 104–108. If the trust is legally a charitable one, then provided it commences to function within the period of the perpetuity limit the Rule against Perpetuities has no application thereto (see *Chamberlayne* v. *Brockett*, L. R. 8 Ch. App. 206, at p. 211, and *Re Bowen*, [1893] 2 Ch. 491) provided also it is not subject to a condition precedent incapable of being satisfied within the period (see *Lord Stratheden* v. *Campbell*, [1894] 3 Ch. 265, *Re Swain*, [1905] 1 Ch. 669, and *Worthing Corporation* v. *Heather*, [1906] 2 Ch. 532). If, however, the project is of the " quasi-charity " type, *a fortiori* if it bears no resemblance to a charity, then care must be taken to frame the trusts within the perpetuity period and even greater care will need to be exercised to deal with the position when at the end of the period the trusts must of necessity come to an

end and arrangements made for disposal of the property subject to the trusts.

Furthermore, if the project is legally charitable the precision in detail which would be essential to give that degree of certainty to a trust to make it valid if it were a private trust is not in such a case necessary, however desirable, for a charitable trust will never fail for uncertainty if the general intention of charity is capable of being discerned so as to make the project indubitably charitable (see *Morice* v. *Bishop of Durham*, 9 Ves. 399 and 10 Ves. 522). As Lord Eldon observed in *Moggridge* v. *Thackwell*, 7 Ves. 69, if the "general intention to give to charity is manifested, the failure of the particular mode in which the charity is to be effectuated shall not destroy the charity; but, if the subsisting intention is charity the law will constitute another mode of devoting the property to charitable purposes, though the formal intention as to the mode cannot be accomplished". In cases where this principle obtains the Court provides a mode to carry out the intention by means of the application of the cy-près doctrine, a doctrine which is not capable of being applied where there is no ascertainable intention of charity beyond the carrying out of a particular object which fails from the commencement, for in such a case the charitable intention has exhausted itself and the cases go to show that the Courts cannot discover a jurisdiction upon which they could apply the doctrine (see *Att.-Gen.* v. *Bishop of Oxford*, 1 Bro. C. C. 444 n., and *Re Pack*, [1918] 1 Ch. 437). The principle of this doctrine will find expression in particular in the case of gifts for purposes of the kind by will where, for instance, the testator may desire to endow a particular institution as a war memorial which may have ceased to exist during the testator's lifetime (see *Re Ovey*, 29 Ch. D. 560).

In the view of the present writer, if there is the slightest doubt as to the project being a charity, it is safer to regard it as a "quasi-charity" (in the absence of taking the necessary steps to bring the project within the ambit of a charity) and to provide accordingly for the endurance of the scheme not beyond the limit of the perpetuity period and for the valid disposition of the property subject to the trust at the termination of that period. This latter will probably be found to cause the greatest difficulty for, as indicated in the article above cited, precaution must be taken to see that the provisions for the disposal of the property must not be of such a mandatory character as virtually to continue automatically the previous trusts. Reference may be made to the above cited articles where methods are described by which these processes of bridging the difficult junction point can be effectuated. The demarcation of the perpetuity period requires reconsideration in view of the decision in *Re Villar*, [1929] 1 Ch. 243, and in particular that of *Re Leverhulme*, *Cooper* v. *Leverhulme*, [1943] 2 A. E. R. 274. In the last-mentioned case Morton, J., sounded a note of caution against the use of the well-known formula referring to the descendants living at the death of the testator of her late Majesty Queen Victoria for the purpose of extending the perpetuity period to the farthest limits possible, and in the notes of recent cases in the *Conveyancer* and *Property Lawyer* (N.S.), Vol. 8, pp. 36–37, dealing therewith, it is observed that the difficulty caused by framing such a limitation under the present conditions, which make it particularly

complex to trace Continental Royal Families, results in such limitation becoming void not for perpetuity but for uncertainty, in support of which observation *Re Moore*, [1901] 1 Ch. 936, is cited, and reference is made to the current 14th edition of *Key & Elphinstone's Precedents in Conveyancing*, Vol. 1, pp. 605, 906, Vol. II, 944, in which either the issue of his late Majesty King Edward VII or his late Majesty King George V are the limitations employed. The writer of the note suggests the addition of some such words as, " such issue now living as can be shown to the satisfaction of the Court as being alive ". Another formula which has been used in the past and is designed to act as a kind of automatic preventive against a transcending period is to use the phrase " without transgressing the Rule against Perpetuities " (*a*). Another formula which has been used is, during the life of the survivor of the issue now living of his late Majesty King George V and twenty-one years after the death of such survivor and such further period, if any, as may be lawful.

These horizons, however, merely postpone the crucial time when reconstruction of the scheme becomes necessary. The present writer would suggest that probably one of the least complicated methods which might be regarded as having a reasonable chance of effectuation without taking upon itself the character of an imperative trust is that which he submitted in the concluding portion of his article previously cited, namely, the employment of a precatory expression indicative of the wishes of the founders but short of an imperative trust, with a proviso making it perfectly clear that no binding trust is thereby imposed. Such a method was adopted in *Sweet's Concise Precedents* with regard to a proviso for the repair of a tomb (4th edn., 886, at p. 1204), and the proviso against a binding trust is dealt with in *Re Pitt-Rivers*, [1902] 1 Ch. 403.

In the case of war memorials, even when the essential purpose is that of a definitely charitable nature, care must be taken to see that together with that purpose no other purpose of a doubtful character is comprehended. In *Hunter* v. *Att.-Gen.*, [1899] A. C. 309, Lord Davey observed at p. 323 that " where charitable purposes are mixed up with other purposes of such a shadowy and indefinite nature that the Court cannot execute them . . . or where the description includes purposes which may or may not be charitable . . . and the discretion is vested in the trustees the whole gift fails for uncertainty " except, as Mr. Brunyate points out in his article on " The Legal Definition of a Charity ", 61 L. Q. R. 268, where the charitable and non-charitable purposes can be sufficiently severed to enable the fund to be divided between them. The moment it is realised that the project is not definitely a charity and comes within the indefinite domain of " Quasi-charities " it must be remembered that the lack of certainty, which in the case of a true charity is capable of being cured by means of a scheme with or without invoking the application of the cy-près doctrine (*b*), is destructive of the whole plan. Uncertainty is only curable in the case of a definite charity, but precision is essential for a project outside the charitable ambit.

(*a*) This is valid for twenty-one years from the settlor's death (see *Re Hooper*, [1932] 1 Ch. 38, and *Pirbright* v. *Salwey*, [1896] W. N. 86).

(*b*) See *Re Gott*, [1944] 1 A. E. R. 293.

There are very few precedents in the books dealing with war memorials, and the draftsman would do well to commence *de novo*, particularly in view of the very many decisions relating to charities which have appeared in the reports since war memorials were established on a large scale after the first Great War. The cases have been surveyed more recently in the article by Mr. Brunyate previously referred to, and during the last few years in the reviews of recent decisions contributed by the present writer to the Annual Charities Supplements to the *Law Journal*. The precedent contained in Volume 5 of the *Conveyancer*, old series, p. 659, is no doubt based on the validity of such trusts as being for the benefit of a defined locality (see *Re Smith*, [1932] 153 and the cases there cited, and see *Re Baynes*, [1944] 2 A. E. R. 579, noted *ante*, Vol. 9, p. 224), but its utility is from the nature of the case limited. The envisagement of the nature of war memorials has evolved since the last Great War and of the forms of charitable projects, to say nothing of "quasi-charitable" projects, it may be said that time cannot wither nor custom stale their infinite variety. Accordingly each project must be considered on its own merits in relation to the particular circumstances attached thereto. If the projects are definitely charitable then the draftsman will of course have regard to the special precautions which have to be taken in respect of charitable dispositions in general. Attention may be drawn in particular to the mode of appointment of trustees and the nature of the governing body. The war memorial when it is a definite charity may be regarded as a particular species of charitable trust which, no doubt, as experience is gained with the various ramifications of the public and private variety in that behalf, may become an important development in the law and practice relating to charities. The cases, however, which will require the greatest possible care will be those which are in the nature of "quasi-charities", and here the draftsman must bear in mind that the prerequisite is "safety first", which in conveyancing practice may still be regarded as a useful and appropriate reminder. Navigation between the Scylla of "uncertainty" and the Charybdis of "perpetuity" calls for especial vigilance.

THE PLANNERS REVIEWED (*a*).

This journal is not, of course, concerned with party politics (indeed, its Editors are ignorant of each other's party, if any), but constitutional law, once so closely associated with the land law, still falls within the conveyancer's orbit in certain of its aspects. Of these aspects one of the most important at the present day is the machinery of control. Land law is steadily becoming more and more a problem in control. For the old Common Law maxim *sic utere tuo ut alienum non lædas* we are beginning to read that you shall do on your land only that which

(*a*) Law and Orders, by C. K. Allen, M.C., D.C.L., F.B.A., J.P., of Lincoln's Inn, Barrister-at-Law, Fellow of University College, Oxford; sometime Professor of Jurisprudence in the University of Oxford. London: Stevens & Sons, Ltd., 119 and 120 Chancery Lane. 1945. pp. xvi and 385. Price 15s.

the Ministry of Town and Country Planning, the Ministry of Agriculture, the County Council, the War Agricultural Executive Committee and such other Ministries, local authorities or statutory bodies as may be concerned shall authorise or shall not forbid. For these reasons, if for no others, the machinery of control is a question which vitally concerns the conveyancer and with the problems of which he should concern himself actively. This is, as we understand it, the purpose of Dr. Allen's book. It is, of course, not confined to the control of land and carries the issues into a wider field, from which indeed it is hard to divorce it, but the principles do not appear to differ, and as such we commend it for study to all our readers.

The subject falls under three headings, first, legislation, and herein more particularly of delegated legislation; secondly, parliamentary control of legislation; and thirdly, interpretation and enforcement of statutory rules. Of these the first and the third more especially concern the conveyancer and therefore lie most in the field of this journal. Dr. Allen, in his *Law in the Making*, has established himself as an authority on the subject of the interpretation of statutes, and therefore what he has to say upon the state of the statute law, which includes, of course, the Statutory Rules and Orders, is worthy of respect and close attention. The picture which he paints of the present methods of delegated legislation is a doleful one. From personal experience of attempts in particular cases to get at the exact position of some matters affecting land when affected by Statutory Rules and Orders, we would say that he does not appear to misrepresent the difficulty in arriving at an accurate interpretation of the law. And we feel that in the realms of the land law we are at the commencement of our troubles.

We may take a simple illustration of the problem of interpretation. On another page we refer to the Acquisition of Land (Owner-Occupier) Regulation, 1945, S. R. & O. 759/L.12/1945, which relates to the definition of owner-occupier under the Town and Country Planning Act, 1945. By section 58 (5) of this Act an owner-occupier, who is in a special position with regard to compensation, is defined mainly by reference to the fact of his occupation or right to occupation. Section 58 (6) enables the Lord Chancellor (not, be it noted, the Minister of Planning, who is the usual authority under the Act) to make *adaptations* (the word of the statute) when the occupier holds "as trustee or otherwise for the benefit of another or subject to the directions of another". This order makes such adaptations. It provides that for the person in occupation, *i.e.*, the trustee, "there were *substituted*" (*i.e.*, in the Act) the persons named in the variety of columns of the Schedule affecting particular types of land. Under the head of settled land the person in occupation must be any beneficiary under the settlement. Now, if the trustees of the settlement are the estate owners under section 23 of the Act they may well be in occupation, and certainly no beneficiary is entitled to occupation against them. But as they take as trustees presumably they cannot take as owner-occupier, because their right has been "substituted", and, say, an infant beneficiary cannot take because he cannot have had occupation—or, if in residence, does he occupy? We feel that we are unable to give any certain answer.

But one problem that this order raises is why such a matter should be left to be determined by statutory order. This question is one which, in other matters, seems to exercise not a little the mind of the learned author. A number of possible reasons suggest themselves, as, for example, that the technicality of the land law requires more skilful investigation than the department concerned with the principal Act is prepared to undertake. We should not like to believe this suggestion. In the control of land, however, this problem of technicality is very difficult. "Occupation" is not itself a very familiar word in the armoury of the land law. For example, does a lodger occupy the rooms where he lodges? He does not have possession, because he is not a tenant but a licensee, but if he does not occupy because he does not possess then what exactly does occupation mean. Probably it is meant to mean possession of the land itself in contradistinction to possession of the estate including pernancy of the rents and profits.

The learned author takes some particular exception to the statutory provision that the orders shall have effect "as if enacted" in the principal Act. Anyone who has made a close study of the Land Registration Rules, which in our experience are admirable on the whole, would agree with his criticism, and these are drawn at the instance of a Department solely concerned with the land law. On the assumption that Departments cannot know what legislation they want when the Act is laid before Parliament—and if a technical Act likely to receive the scrutiny of some of the best lawyers in England—there seems much to be said for some principle by which all subordinate legislation passes through a mill which will ensure at least some degree of technical consistency and accuracy. It may be too much to ask the administrator to respect the symmetry of the law, but we do suggest that needless complications by the introduction of new terms, or the only partially accurate use of old terms, should be avoided. While we recognise the special skill of the Parliamentary draftsmen and of some departmental draftsmen, we do suggest that departments dealing with highly developed and intricate legal topics would help themselves and the public by referring their drafts to outside lawyers of known reputation in that sphere. But our readers will do well to ponder the problems of the machinery of legislation as depicted by Dr. Allen, and should they feel the need of reform, perhaps press for it through appropriate official bodies.

If and when the conveyancer has understood the law the planner has made he may still be called upon in the interests of his clients to resist its execution in particular instances. It is human to err and Government Departments are not divine. It is in the possibility of challenge of executive decisions that Dr. Allen becomes most polemical and many would not be prepared to go all the way with him, but what he has to say about ousting the jurisdiction of the Courts is worthy of our close attention. The learned author does not object to extraordinary tribunals; indeed, he seems to lean in favour of the Continental system of special Administrative Courts, but his gravest strictures rest upon provisions conferring upon the Minister the final decision. Again, he does not give as an illustration the wide powers conferred upon the Chief Land Registrar in the matter of titles; so, for example, when there is a discrepancy between the plan and the verbal

description it is for the Registrar to resolve it. This delegation may be due in no small measure to the fact that often appeal lies to the Court, but there is the germ of the notion and the Registrar officially may not be uninterested that the discrepancy should be resolved to reduce the proprietor's title to the smallest area; so, for instance, to reduce any compensation payable on rectification of the register. But to the conveyancer much more important are the powers of the Minister of Town and Country Planning or the Minister of Health, because they are more likely to be exercised by way of expropriation. Now, as Dr. Allen points out, the powers of decision may present great difficulty of classification: are they truly judicial or quasi-judicial or are they merely administrative? To use an illustration long outside the realm of controversy, was Charles I exercising a purely administrative discretion or was he acting quasi-judicially when he decided to levy ship money on the inland counties? The Court held, and in this respect rightly held, that it was purely administrative. Now, if there is a doubt whether an area should be subjected to a slum clearance order, is the Minister really making a judicial or an administrative decision? It is submitted that he is making a judicial decision if the law does not give him *carte blanche* to make the order as and when he likes. If he has to find facts and to make the order only if these facts are present, although he may have a discretion to refuse the order notwithstanding that they are all present, then he acts in a judicial capacity. Now the existence of the discretion to make or refuse the order obviously renders pure judicial procedure impossible. The history of the Court of Chancery shows the weakness of judicial discretion. The Minister needs an *arbitrary* discretion to change with the winds of departmental policy. This is the justification for making the Minister a judge of expediency. But the decision on the existence of the facts which give him this arbitrary power and the determination whether on the facts the law permits such an arbitrary power to be exercised is a judicial question; a matter of law for the lawyer. So long as the power is exercised only on certain conditions, and most powers are so circumscribed, the right to exercise is a matter of *vires* and its alleged improper exercise is a question of *ultra vires*.

A Minister, who has an arbitrary discretion to do something which is required by law to be done only in a limited set of circumstances, is a judge and a legal judge in his own cause. We are minded of a story told by counsel three hundred and fifty years ago when this question was discussed. Once upon a time the Cardinals came to the Pope and told him that he had sinned greatly. The Pope admitted this and told the Cardinals to judge him. But the Cardinals refused to judge the Holy Father and asked him to judge himself. "I judge me to be burned", said the Pope, and he was burned, and *afterwards he became a saint*. We are not so sure that all our Ministers would wish to qualify for sainthood.

Respectfully we would suggest that as long as appeal lies only on the question of *ultra vires* the best test is an appeal to the Law Courts—preferably direct to the Court of Appeal with appeal to the Lords only with special leave. The delays in policy from such appeals are little likely to be large.

At this point, perhaps, we should distinguish between law and

arbitrary discretion. The word " arbitrary " is used in no derogative sense. The processes of thought and the considerations determining the policy of the administrator should not be confined to the elaborations of legal logic. The field is both wider and narrower and the principle of " precedent ", unfortunately not unknown in Government Departments, is absurd. Precedent is of value only for the *ratio decidendi*, but that assumes a closely knit and reasoned argument stated and recorded for the determination of each case and the absence of discretion, as the history of the intractable subject of equitable remedies shows. We speak of a discretion as arbitrary to differentiate it from one in which the answer is really determined by the logical application of prior *rationes decidendi*. To fetter an administration by any such logical rules would be fatal. To assume that the administrator either desires or is capable of the exercise of strictly legal principles of determination is not only absurd but contrary to the known facts of recruitment and training for the Civil Service.

Where the discretion is purely arbitrary, as, for example, in the grant or revocation of licences to which no legal conditions are attached, we have a good deal of sympathy with the administrator who objects to the interference of the Courts even on the hazy and obscure ground of natural justice. With the policy of conferring such arbitrary discretions we are not concerned. Dr. Allen's commentary upon " natural justice " and the recent decisions demand attention as showing that this aspect of the law can be satisfactory to neither administrator nor lawyer. But we think that much of the obscurity arises from the expression " quasi-judicial " which in itself is obscure. It arises no doubt from the fact that the tribunal commonly is concerned to administer a mixture of law and arbitrary discretion, but these, like oil and water, do not mix, and so the proceedings are " quasi-judicial ". In so far as the tribunal determines facts with a view to ascertain the existence of a legal power or duty and interprets the application of the power to the facts, the tribunal acts judicially, and in so far as it consults expediency and the policy of the department to decide when, if and how the power should be exercised, it acts non-judicially and so it becomes quasi-judicial. If my son asks me whether he can drive my car, I ask myself when a boy can drive a car, and if I find as a fact that the boy is sixteen and has a driving licence and decide in law that he can drive a car I act judicially, and if I then decide that I dare not risk the paint on the wings and say that he cannot drive the car, I act non-judicially, and hence I become a quasi-judicial tribunal! But that is no reason why, if I give him leave to drive the car, the Law Courts should not decide the legal question of *ultra vires*, namely, that I had no right to let him drive the car because it really belonged to someone else.

After more than a quarter of a century spent mainly in trying to solve legal conundrums and to train lay minds into legal minds and methods of thought, we marvel that politicians and civil servants without legal training and often with little or no legal aptitude should be willing to undertake the task of assessing evidence and deciding legal questions. Such willingness seems to argue either ignorance of the necessary technicality of legal thought or indifference to the importance of law in the community. This is a political question which is not essentially

our question, but we cannot forbear to wonder what becomes of the many declarations of politicians that the war has been fought for the rule of law. We feel that law like charity should begin at home.

Dr. Allen has added to his other illuminating chapters a powerful plea for the immediate reform of procedure in proceedings against the Crown. Any lawyer who has had occasion to advise in such matters will appreciate the force and importance of this plea. It is a reform which has been recommended and is long overdue. Nor is it easy to see why there should be delay, for it cannot be the purpose of any democratic Government to deny to its citizens the rights, even against the State, which it has allowed to them, but the present technicalities may amount to such a denial notwithstanding the promise of Magna Carta that justice should be denied to no man.

We must conclude these random reflections evoked by a study of a stimulating book by commending it once more to our readers. We do not mean thereby that we should endorse all its propositions or proposals. It is about one of the most significant legal problems of the day, but inevitably it is controversial. Nevertheless, it demands attention and the material is placed before the reader in a most attractive form which constitutes a valuable contribution to this vital subject.

H. P.

REQUISITIONED LAND AND THE WAR WORKS COMMISSION.

By R. M. MONTGOMERY, one of His Majesty's Counsel.

The War Works Commission.

The Requisitioned Land and War Works Act, 1945 (8 & 9 Geo. 6, c. 43), which received the Royal Assent on June 15, 1945, provides for the appointment of a War Works Commission whose duty it is to consider any matters referred to them under the Act. The Commission are to cause such inquiries to be made (including, if they think fit, the holding of a local inquiry) and to give such opportunities to such persons of making representations as they think fit (section 2 (3), (4)).

Consideration of Proposals to Acquire Land.

The function of the Commission is to report upon certain proposals for the compulsory acquisition of land or for acquiring or modifying certain rights in relation to land which may be made under the Act by one of the Ministers therein mentioned, if objection is taken to those proposals by a person specified in the Act (section 8 (1), (2); see p. 31, *post*).

Principles upon which Commission Act.—In considering any proposals the Commission must have regard to all relevant considerations and must recommend what in their opinion is reasonable in view of the national and local interests and requirements (whether as to planning

or amenities or otherwise) and the private interests affected (section 11 (1)). But if the proposal is for the acquisition of land on the ground that the value of works ought to be preserved, the Commission must pay particular regard to three matters, namely, (a) the cost of the works, (b) any financial advantage which would accrue to any objector if the land were not acquired, (c) the degree of loss or hardship which any objector would sustain if the land were acquired (section 11 (2)).

If the allegation is that works ought to be preserved the Commission may report that all or any part of the land ought not to be acquired if, within a specified time, any person interested in the land pays to the Minister a specified sum or a sum to be determined by arbitration before an official arbitrator, but held under the Arbitration Acts, 1889 to 1934. But the right to pay a sum to be determined by arbitration is open to a person interested in the land, only if within the specified time he gives notice in writing to the Minister that he requires the amount to be determined by arbitration (section 10 (1)). If such a payment is made and nevertheless the land is retained under emergency powers after the date of the payment, the provisions for compensation in the Compensation (Defence) Act, 1939, s. 2, and for computation of compensation by reference to the state of the land before a requisition in the War Damage Act, 1943, s. 17, have effect as if a new period of requisition had begun on that date (Act of 1945, s. 54).

If on the other hand the ground for a proposal is the desirability in the public interest that the land or part of it should be dealt with in a particular manner with a view to its total or partial rehabilitation (see section 6, *post*, p. 32), then the Commission must pay particular regard to (a) the practicability of restoring the land to its former condition and the cost of restoration; (b) the desirability of dealing with the land or the part of the land otherwise than by restoring it, and especially any question of amenities enjoyed or to be enjoyed by members of the public; and (c) the degree of loss or hardship which any objector would sustain if the land were acquired (section 11 (3)).

Rehabilitation. The Commission may report that the land ought not to be acquired if a specified person undertakes in writing to the Minister within a specified time that he will take specified steps within specified times for the total or partial rehabilitation of the land (section 10 (2)). The Commission must, before specifying the person, be satisfied that he has sufficient rights in the land and in any other relevant land to enable him to carry out his undertaking (section 10 (2), proviso). If the specified condition is satisfied, the report is deemed to be a report that the land ought not to be acquired, but if the condition is not satisfied, the report is deemed to be a report that the land can properly be acquired (section 10 (3)). If an undertaking is given but not carried out, the Minister may proceed with the acquisition (section 10 (3), proviso).

Dwelling-house. If a proposal involves the acquisition of a dwelling-house (other than one the construction of which was government war work), or any part of a building occupied with a dwelling-house or of its park (see *Payne* v. *Minister of Health* (1938), 158 L. T. 523; *Re Ripon* (*Highfield*) *Housing Order, 1938*, *White and Collins* v.

Minister of Health, [1939] 2 K. B. 838) or garden, or the acquisition or modification of any easement or restriction relating thereto, the Commission must consider the nature and extent of any objector's interest in the dwelling-house, and, if his interest is considered a substantial one, must report that the carrying out of the proposals ought not to be proceeded with unless in their opinion either (a) the carrying out of those proposals is necessary in order to preserve something of substantial value to the community; or (b) those proposals can be carried out without seriously affecting the amenity or convenience of the dwelling-house (section 11 (4)).

Dwelling-house for this purpose does not include hotel or boarding-house or any premises in respect of which a justices' licence is in force or (by virtue of section 10 of the Finance Act, 1942), is in suspense by reason of war circumstances (section 59 (1)).

Commons, etc. If acquisition of land is proposed because there are on the land works constructed, during the period when the Emergency Powers (Defence) Act, 1939, was in force, for war purposes by, or by arrangement with, a Minister or under emergency powers (for definition see section 59 (1)), wholly or partly at the expense of the Crown or of some person having no interest or a limited interest in the land, and in the Minister's opinion the necessary statutory conditions (section 5 (1) (a), (b) and (c), pp. 31, 32, *post*) are present, but the land includes any part of a common, open space or fuel or field garden allotment, then, unless the Commission consider the works to be both substantial and in their nature permanent, the Commission must report that the proposals in so far as they relate to the common, open space or fuel or field garden allotment must not be proceeded with (section 11 (5)).

A common includes any land subject to be enclosed under the Inclosure Acts, 1845 to 1882, and any town or village green.

An open space is any land laid out as a public garden or used for the purposes of public recreation, or a disused burial ground (section 59 (1)).

Fuel or field garden allotment means an allotment set out as such under an Inclosure Act (section 59 (1)), that is in an inclosure award (see *Elve* v. *Boyton*, [1891] 1 Ch. 501; *R.* v. *Walker* (1875), L. R. 10 Q. B. 355, at p. 358, *per* Lush, J.).

In considering whether conditions for the exercise of a Minister's powers under Part II of the Act (sections 4–14 inclusive) are fulfilled, work done on any land of which possession has been taken by the Minister of Agriculture and Fisheries or by the War Agricultural Executive Committee (defined in Agriculture (Miscellaneous War Provisions) Act, 1940, s. 30), being work done in the course of its cultivation or work done mainly for its improvement for agricultural purposes, is not to be treated as work within the above provisions (1945 Act, s. 13).

But the Minister must not acquire or serve notice to treat for the acquisition of any part of a common or open space unless each House of Parliament resolves that the proposals in relation to that common or open space ought to proceed (section 12); or in the case of a common the Minister of Agriculture, or in the case of any other open space the Minister of Town and Country Planning, certifies that other

land of equal area and equally advantageous to the public will be provided in place of the common or open space (section 12, proviso).

Objections to Proposals.—Before reporting to the Minister, the Commission must afford to any person who had duly objected and whose views should be considered, an opportunity of appearing before them or of appearing before a person appointed for that purpose by them, whether at a local inquiry or otherwise (section 8 (3)).

If objection is taken to any of the proposals on the ground that it is not in accordance with national or local interests or requirements as to town planning or amenities and the Commission are of opinion that the objection is substantial, they must notify the Minister of Town and Country Planning and, before reporting, must consider any information or representations put before them by him (section 8 (4)). But unless the proposals are for the acquisition of the whole or any part of a common, open space or fuel or field garden allotment, or of the property of any local authority (section 8 (5), proviso), this provision does not apply if the Board of Trade certify (a) that the land in question is or is part of industrial premises (even if in an incomplete state), and (b) that those premises in substance owe their character, so far as buildings and structures are concerned, to government war work, and (c) that for orderly transition to peace conditions the Crown should without delay be able to dispose of the premises and all necessary easements and other rights over or in relation to other lands, provided that the Minister of Town and Country Planning certifies that in his opinion the proposals are consistent with the proper use and development of land (section 8 (5)).

New Temporary Powers of Acquisition.

New temporary powers of acquisition of land are given by Part II of the Act (sections 4–14 inclusive) to (1) Ministers who already have power to acquire land under the Defence Acts, that is (see section 59 (1)) under any of the Defence Acts, 1842 to 1935, as amended, extended or applied by or under any enactment, including the provisions of section 7 of the Lands Clauses Consolidation Acts Amendment Act, 1860, and of section 7 of the Militia (Lands and Buildings) Act, 1873, and the provisions of sections 9 to 19 of the Admiralty Lands and Works Act, 1864; (2) the Minister of War Transport; (3) the Postmaster-General; and (4) the Minister of Works (1945 Act, s. 4).

When Exercisable.—The new powers of acquisition are given in the following cases:—

(1) *Government War Works.* Where there are on the land works constructed, during the period during which the Emergency Powers (Defence) Act was in force, for war purposes by or by arrangement with a Minister or under emergency powers and those works were constructed wholly or partly at the expense of the Crown or of some other person having no interest or a limited interest in the land, and in the Minister's opinion either (a) the value of the works ought to be preserved for the Crown or that other person, his legal personal representatives or his successor

in the trade or business in connection with the carrying on of which he incurred the expense; or (b) the right to use the works (including buildings, structures and improvements, especially underground works and telephone lines) (see definition in section 59 (1), *post*) ought to be preserved or secured to the Crown or the said person and the land cannot be acquired under the Defence Acts; or (c) the right to determine the use to which the works are put ought to be secured to the Crown and the land cannot be acquired under the Defence Acts (section 5 (1)). In these cases the power of acquisition extends to any adjacent land which, in the Minister's opinion, must be held with the site of the works if the works are to be properly utilised and maintained (section 5 (2)). In cases where a right of acquisition would arise under (b) if the works were constructed at the expense of a person other than the owner, but the works were constructed at the expense of the owner, the Minister may acquire any easement or right restrictive of the user of any other land, if in his opinion such easement or right is essential to the full enjoyment of the land on which the works are, and he may then transfer the right to any person having an interest in that land (section 7 (2)). (Note. Throughout the Act easement includes a right of support for any land or buildings or works, and a right to withdraw support, even if obtained under the Defence Acts (section 59 (3)).

(2) *Depreciated Land.* Where the value of the land has been diminished by work done thereon during the period during which the Emergency Powers (Defence) Act, 1939, is in force, or by damage caused by any use thereof to which that land is put during that period by or by arrangement with a Minister, or under emergency powers, and in the Minister's opinion it is desirable that in the public interest the land should be dealt with in a particular manner with a view to its total or partial rehabilitation and is likely to be so dealt with only if acquired, the land may be acquired (section 6 (1)). In this case also the power of acquisition extends to adjacent land if in the Minister's opinion this is necessary (section 6 (2)).

Easements and Other Rights.—In the case of land which a Minister might acquire under Part II of the Act (sections 4–14 inclusive), he may (a) under the Defence Acts, acquire any easement over, or right restrictive of the user of, any other land, if in his opinion it is essential to the full enjoyment of the acquired land; (b) if there are government works on the land that might be acquired, by order discharge or modify any restriction as to its user or as to building thereon arising from contract, if in his opinion the continued existence of the restriction would prevent the retention of the works or would impede their reasonable user for public or private purposes (section 7 (1)). Any person having an interest in the land entitled to the benefit of the discharged or modified restriction is entitled to compensation (section 7 (3)). The Acquisition of Land (Assessment of Compensation) Act, 1919, applies with any necessary modifications (1945 Act, s. 7 (4)).

Procedure by Minister.—Before proceeding to acquire compulsorily by virtue of Part II of the Act any land or right or to discharge or

modify any restriction as above set out, the Minister must publish in a specified manner (see section 8 (1)) (by service on specified persons and publication in appropriate newspapers) notice of his proposals specifying the grounds and a time, not less than three months from the date of publication, within which written notice of objection may be sent to him, and must also deposit with the local planning authority (for definition see section 59 (1)) a map identifying the land and this map is to be open to inspection at all reasonable hours without payment (section 8 (1)).

If the Minister receives within the specified time a written notice of objection from (a) a person who appears to him to have an interest in the land; or (b) where in his opinion public amenities will be affected, from the local planning authority, or any local authority or any society or body having as one of its objects the preservation of such amenities, whose views in his opinion should be considered; or (c) where it appears to him that the proposals may affect scientific research, a society or body having for one of its objects the furtherance of scientific research whose views should in his opinion be considered, he must, unless he decides not to proceed, not later than two months from the specified time refer the proposals to the Commission for a report (section 8 (2)).

On receiving the Commission's report, the Minister must forthwith send a copy to any qualified objector (section 8 (6)).

Powers of Minister on Receipt of Report of Commission in Respect of Dwelling-house.—If the Commission report (a) that land consists of a dwelling-house (not being a dwelling-house the construction of which was government war work); or (b) that land consists of the whole or part of a building occupied with, or garden or park of, such a dwelling-house, and could not be severed from the dwelling-house without seriously affecting the amenity or convenience of the dwelling-house; or (c) that land which would be adversely affected by the acquisition of an easement or other right or by the discharge or modification of a restriction is such a dwelling-house or such a building or part of a building occupied as is described in (b), and that the acquisition of the easement or right, or the discharge or modification of the restriction would seriously affect the amenity or convenience of the dwelling-house; and further report in any such case that the land or the easement or other right ought not to be acquired, or the restriction discharged or modified, the Minister must not proceed with the proposed acquisition, discharge or modification (section 9 (5)).

In other cases the Minister has certain rights of proceeding with his proposals in spite of an adverse report by the Commission, but before proceeding with any proposals otherwise than in accordance with the Commission's report, the Minister must lay before both Houses of Parliament a copy of the report and a statement of the reasons why he intends to proceed; and if either House within forty days resolves that the proposals shall not be proceeded with otherwise than in accordance with the report, the Minister must not so proceed. The forty days include the day on which the copy report and the statement

are laid before the House, but do not include periods of dissolution or prorogation or adjournment for more than four days at a time (section 9 (6)).

Powers of Minister in Other Cases.—Apart from the case of a dwelling-house and subject to so laying the matter before Parliament, the Minister may proceed with his proposals in spite of an adverse report by the Commission in certain cases relating to works (section 9 (1), (2), (3)). These cases are as follows:—

(1) The acquisition of land, if one of the grounds of the proposal for the acquisition was that the right to use, or determine the use of, works ought to be preserved or secured, and the land consists of the site of the works or of adjacent land which was occupied with the site after their construction and must in the opinion of the Minister be held therewith if the works are to be properly utilised and maintained (section 9 (1)).

(2) The acquisition of an easement or restrictive right, if one of the grounds of the proposal was that the right to use, or determine the use of, works ought to be preserved or secured, and either land is proposed to be acquired or could be acquired but for the fact that the Minister owns it, or the proposal involves the acquisition of an easement or right restrictive of the user of other land which in the Minister's opinion is essential to the full enjoyment of the first-mentioned land (section 9 (2)).

(3) The discharge or modification of a restriction as to the user of land or as to building thereon, if in his opinion the proposed discharge or modification is necessary if works on the land constructed, during the period during which the Emergency Powers (Defence) Act, 1939, was in force, for war purposes by or by arrangement with a Minister or under emergency powers, are to be, or be capable of being, put to the use to which in his opinion they ought to be capable of being put (section 9 (3)).

If on a proposal involving the acquisition of land the Commission report that the land or any part of it ought not to be acquired but that an easement over, or right restrictive of the user of, it can properly be acquired, the Minister may if he thinks fit acquire that easement or right as if it were contained in the proposal (section 9 (4)).

Duration of Powers of Acquisition.—The relevant agreement to buy, notice to treat or order must be made or served or else the notice of proposals must be published in less than two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, was in force (1945 Act, s. 14 (1)). Except where an undertaking has been given (*ante*, p. 29) to take steps for the rehabilitation of land and not carried out, any before-mentioned right to acquire land which arises by reason of anything done on land while in the possession of a Minister, or of a person occupying or using it under the authority of a Minister, is not available when that land is no longer in the possession of any Minister or any such person (section 14 (2)).

But the power to discharge or modify any restriction as to the user of land or as to building thereon may, where land is being acquired, be exercised at any time provided that notice of proposals in that

behalf is duly published, or the order is made, before the acquisition of the land (section 14 (4)).

Restrictions on User.—Land acquired as aforesaid cannot be disposed of free from any restriction as to user of that land or as to building thereon (section 32 (3)). This gets over the provision for resale free from incumbrances contained in Defence Act, 1842, s. 14.

Amendments of Defence Act.

Acquisition not by virtue of Part II of Act of 1945.—If a notice to treat is given under the Defence Acts by a Minister before the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, is in force, his power to acquire land for any purpose includes power to acquire for the same purpose any easement over, or right restrictive of the user of, any land which easement or right he requires for that purpose (1945 Act, s. 33 (1)).

If notice to treat is given within the said period, the surface of land may be acquired under the Defence Acts without the minerals or subjacent strata or any part thereof, and the minerals or subjacent strata or any part may be so acquired without the surface.

If a Minister or any person on his behalf is in possession of any land under a lease or tenancy and either notice to treat is given within the said period or the acquisition is by virtue of the present Act, any interest reversionary thereon may be acquired under the Defence Acts.

Procedure.—If a notice to treat is given before the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, is in force, or if the acquisition is by proposals duly made by a Minister under Part II of the 1945 Act, land described in a notice to treat may be compulsorily acquired under the Defence Acts, as though it has not been surveyed and marked out as required by section 16 of the Defence Act, 1842 (1945 Act, s. 35 (1)).

If a notice to treat is given under similar circumstances, neither the consent of the Lord Lieutenant nor a warrant from the Treasury is necessary as required by the Defence Act, 1842, s. 23, and the Lands Clauses Amendment Act, 1860, s. 7, proviso (1945 Act, s. 35 (2)).

Easements, etc.—When a Minister has power under the Defence Acts to acquire an easement or right restrictive of the user of any land, he may serve a notice to treat for the acquisition of the easement or right on the persons who would be entitled to sell, or who have any interest in, the adversely affected land (section 36 (1)); and any power of any persons under those Acts to convey land is deemed to include power to grant to a Minister, by covenant or otherwise, any such easement or right (section 36 (2)). Such a notice to treat, if for an easement relating to water, addressed generally to all persons interested in any adversely affected land, is deemed to be duly served on all those persons if published in the *London Gazette* and in such other manner

as, in the Minister's opinion, is best adapted for informing those persons (section 36 (3)).

If, in the Minister's opinion, he is unable without undue delay, to acquire such easement or right by agreement, he may, after two months from the service of the notice to treat, confer on himself and also upon his successors in title, the easement or right by deed poll (section 37 (1)). Such a deed poll has the effect of, and for the purposes of the Land Registration Act, 1925, and the Land Charges Act, 1925, is deemed to be, a deed of grant or covenant entered into with the Minister by all necessary parties (section 37 (2)).

If any adversely affected land is registered land, then the grant of the easement may be registered and notice of the easement or right may be entered in the register, without the production of any outstanding land certificate; but this is without prejudice to the Registrar's power to compel the production of the certificate for the purposes mentioned in section 64 of the Land Registration Act, 1925 (1945 Act, s. 37 (3)).

A statement in such a deed poll that the above-mentioned statutory requirements preliminary to the execution of the deed poll (under section 36 (3)) have been complied with is conclusive, except for the purposes of proceedings commenced within two years after its execution (section 36 (4)).

The Minister must give notice of the effect of the deed poll in the manner best adapted, in his opinion, for informing persons affected (section 36 (5)).

Where a right restrictive of the user of any land has been acquired by a Minister under the Defence Acts, and between the date of the notice to treat and the acquisition of that right, any works have been constructed on, over or below the surface of the adversely affected land, and the construction of the works after such acquisition would have infringed the right, the Minister may remove the works and recover his reasonable costs of so doing from the person who constructed the works (section 38 (1)).

A Minister may release an easement or right acquired under the Defence Acts, either wholly or partly (section 38 (2)).

Discharge of Restrictive Covenants.—Section 84 of the Law of Property Act, 1925, relating to the discharge or modification of restrictive covenants, does not apply to any covenant obtained under the Defence Acts, so long as the covenant is enforceable by a Minister against the persons for the time being entitled to the land adversely affected thereby; but this does not affect the operation of subsection (11) of the said section 84, which excepts from the operation of that section, *inter alia*, restrictions created for naval, military or air force purposes (section 38 (3)).

Compensation for Acquisition of Easements and Rights.—Any person whose interest in land over which an easement, or right restrictive of its user, is acquired under the Defence Acts, is entitled to compensation in respect of the diminution in the value of his interest (section 39).

Highways.

Under Part III of the Act (sections 15–22) the Minister of War Transport is given new powers in respect of the stopping up, diversion and improvement of highways. It is well to keep in mind that a highway is a way over which the public have a right of passing and repassing. It is equally a public highway whether it is repairable by a public authority (representing the inhabitants at large) or is repairable by a private person or is not repairable, as a legal duty, by anyone (*R.* v. *Wilson* (1852), 18 Q. B. 348).

Stopping up or Diversion.—Where any highway has been stopped up or diverted in the exercise of emergency powers, the Minister of War Transport may, if satisfied that in the public interest it is expedient, by order authorise its permanent stopping up or diversion (section 15 (1)). The order may contain such consequential, incidental and supplemental provisions as appear to the Minister expedient for the purposes of the order, including provisions authorising the compulsory acquisition of land (section 15 (3)).

But the stopping up or diversion of a highway in pursuance of an authority to stop up and plough, given under paragraph (5A) of Regulation 62 of the Defence (General) Regulations, 1939, by the Minister of Agriculture and Fisheries, is not deemed a stopping up or diversion for the above or the following purposes (1945 Act, s. 15 (2)).

The order may, (a) require as a substitute for any highway stopped up, the provision or improvement of another highway; (b) direct that any such other highway shall be repairable by the inhabitants at large and specify the highway authority for it; (c) direct that the substituted highway shall be a trunk road (for purposes of the Trunk Roads Act, 1936) if the highway stopped up was a trunk road; (d) provide for the retention or removal of any cables, wires, mains or pipes along, across, over or under the stopped up or diverted highway, and for the extinction, modification or preservation of any rights as to their user or maintenance; (e) if the original highway is to be diverted permanently, or if any other highway is provided or improved, authorise or require the provision of cables, wires, mains or pipes in substitution for those removed from the original highway and may confer rights as to their user or maintenance; (f) require out of moneys to be provided by Parliament—(i) payment for, or contributions towards, the cost of any work required by the order to be done, or increased expenditure ascribable to the doing of such work or to the provision or improvement, before the making of the order, of any highway substituted for one stopped up; (ii) repayment of or contributions towards any compensation paid by the highway authority in respect of restrictions imposed under section 1 (adoption of standard widths for roads), or section 2 (building development along frontages) of the Restriction of Ribbon Development Act, 1935, as respects any highway stopped up or diverted under the order (1945 Act, s. 15 (2)). Telegraph lines are separately dealt with in Part IV of the Act (sections 23–25).

Railways, Tramways, etc.—Where in the exercise of emergency powers or for war purposes any railway or tramway or any cable, wire, main or pipe has been placed along, across, under or over a highway, the Minister of War Transport may, if satisfied that to do so is expedient in the public interest, by order authorise, subject to any specified conditions and limitations, the railway, tramway, cable, wire, main or pipe to continue to be used and maintained until other provision is made under any Act (section 16 (1)). The order may contain such consequential, incidental and supplemental provisions as appear to the Minister to be expedient (section 16 (2)).

But the power of the Minister does not extend to any telegraph line placed or maintained by virtue of any provision of the Telegraph Acts, 1863 to 1943 (1945 Act, s. 22 (1)).

Notice of Proposed Order.—Before making an order the Minister must give notice of his proposals by (a) advertisement in two or more newspapers circulating in the locality; (b) sending notice to every local authority (including a parish council and the parish meeting of a rural parish not having a parish council) in whose area the highway is or will be situated, and to any water, gas or electricity undertakers having cables, wires, mains or pipes along, in or over such highway; (c) displaying the notice prominently at the ends (see *R.* v. *Surrey JJ.* (1870), L. R. 5 Q. B. 466; and cf. *R.* v. *Surrey JJ.*, [1892] 1 Q. B. 867) of so much of any highway as is proposed to be stopped up or diverted; (d) in the case of an order authorising the acquisition of land, serving notice on every owner, lessee or occupier (except tenants for a month or less) (section 17 (1)).

The notice must specify the place where copies of the draft proposed order can be obtained, and state that the order will be made unless within a specified period (not less than three months) written notice of objection is given by someone to the Minister (section 17 (2)). Methods of serving the notice are prescribed (section 17 (3)). If the Minister receives such a notice of objection, he must, unless he decides not to proceed with his notice, refer the draft order to the Commission and await its report (section 17 (4)).

Proceedings after Reference to Commission.—Where a draft order is referred to the Commission for a report, the Commission must afford to any person who has duly objected an opportunity of appearing before them or a person appointed by them, whether at a local inquiry or otherwise (section 18 (1) (a)).

The Commission may report that the order can properly be made as proposed or subject to specified modifications, or that no order ought to be made (section 18 (1) (b)).

In certain cases the Minister has a right to proceed with his proposals in spite of any adverse report by the Commission, but before making an order otherwise than in accordance with the Commission's report, the Minister must lay before both Houses of Parliament a copy of the report and a statement of the reasons why he intends to make the order; and if either House within forty days resolves that the proposals shall not be proceeded with otherwise than in accordance with the report, the Minister must not so proceed (section 18 (5)). The

forty days include the day on which the copy report and statement are laid before the House, but do not include periods of dissolution or prorogation or adjournments for more than four days at a time (section 18 (5), second paragraph).

The cases in which the Minister may disregard the Commission's report that no order ought to be made or that the order can be properly made subject to modifications are as follows :—

If the making of the order is in his opinion necessary, either without modification or with some only of the specified modifications, either (a) for any purpose for which any Minister had power (apart from the new temporary powers conferred by Part II of the Act) to acquire land under the Defence Acts, or for the proper enjoyment of land which any Minister would have had power (apart from Part II) to acquire (section 18 (2) (a)); or (b) for the proper utilisation of works done during the period during which the Emergency Powers (Defence) Act, 1939, was in force, on the land for war purposes or by arrangement with a Minister or under emergency powers, if such works are works the right to use or determine the use of which ought in the opinion of the Minister of War Transport to be preserved or secured for the Crown or for some other person (section 18 (2) (b)).

If the draft order contained a provision for the payment of money and the Minister decides to exercise his power of making an order in spite of the Commission's report, he must refer back to the Commission the question whether any money should or should not be paid, and either defer making the order until he receives their report, or make his order as to other matters, and, if the Commission report that money ought to be paid, make a supplemental order providing for the payment of money in accordance with the report (section 18 (3)).

Validity and Date of Operation of Orders under Part III.—As soon as may be after making the order, the Minister must give notice (in the same way as notice has to be given of the draft order, for which see p. 38, *ante*) that the order has been made and that copies may be obtained at a specified place on payment of a specified sum (not exceeding 1s.) (section 19 (1)).

Any aggrieved person may question the validity of the order or any of its provisions on the ground that it is *ultra vires* or that any requirement has not been complied with, by making, within six weeks from the last required publication in a newspaper of the notice that the order has been made, an application to the High Court. The Court may thereupon (a) by interim order suspend the operation of the Minister's order or any of its provisions, either generally or in so far as it affects property of the applicant; and (b) if satisfied that the order is *ultra vires* or that the applicant's interests have been substantially prejudiced by non-compliance with any of the statutory requirements, may quash the order or any of its provisions either generally or in so far as it affects property of the applicant (section 19 (2). Cf. the Housing Act, 1930, s. 11 (3), (4); *Re Bowman, South Shields (Thames Street) Clearance Order, 1931*, [1932] 2 K. B. 621; Housing Act, 1936, Sched. II, cl. 2; *Ripon (Highfield) Housing Confirmation Order, 1938, White and Collins* v. *Minister of Health*, [1939] 2

K. B. 842). This is the only way in which an order or any of its provisions can be questioned (section 19 (3)).

Duration of Power to make Orders.—No such order can be made unless the proposals are published before the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, remains in force (section 20 (1), and section 59 (1)).

If the order authorises the permanent stopping up or diversion of a highway, it cannot be made after the highway has ceased to be temporarily stopped up or diverted (section 20 (2)).

Temporary Continuance of Stopping up, etc.—Any order made under a defence regulation for the stopping up or diversion of a highway, unless previously revoked, continues in force until the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, remains in force, notwithstanding the expiration or revocation of the defence regulation in question and notwithstanding that the stopping up or diversion is no longer required for any purpose connected with any war in which His Majesty is engaged during that period (section 21 (1) and section 59). But this is subject to a further provision, namely, that if before the expiration of the said two years proposals for the permanent stopping up or diversion of the highway have been duly published, the period for which, unless previously revoked, the order is to continue in force is extended until (a) an order in pursuance of those proposals becomes operative, or (b) those proposals are abandoned (section 21 (1), proviso).

Railway, Tramway, Cable, etc., on Highway.—If the order authorises the permanent use and maintenance along, across, over or under a highway of a railway, tramway, cable, wire, main or pipe it cannot be made after the railway, tramway, cable, wire, main or pipe has been abandoned (section 20 (2)).

But a railway, tramway, cable, wire, main or pipe so placed in the exercise of emergency powers or for war purposes may (notwithstanding that its use and maintenance is no longer required for war purposes) continue to be used and maintained until the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, is in force or such earlier period as may be specified by the appropriate Minister (section 21 (2) and section 59 (1)). But this is subject to a further provision, namely, that if before the expiration of the said two years, proposals for the permanent use and maintenance of the railway, tramway, cable, wire, main or pipe have been duly published, the period of use and maintenance is extended until (a) an order in pursuance of those proposals becomes operative, or (b) those proposals are abandoned (section 21 (2), proviso).

Telegraph Lines.

Where in the exercise of emergency powers the Postmaster-General has constructed any telegraph line, the line is, as from the end of the

period during which the Emergency Powers (Defence) Act, 1939, is in force or such earlier date as the Postmaster-General fixes, to be treated as having been constructed, with all necessary consents, under the Telegraph Acts, 1863 to 1943, except for the purposes of (a) any agreement made before June 15, 1945, for regulating the exercise of the Postmaster-General's rights, and (b) the application to the line of the Compensation (Defence) Act, 1939 (1945 Act, s. 23).

Removal of Telegraphic Lines.—Where the Telegraph Acts, 1863 to 1943, thus become applicable to a telegraphic line, any person whose consent would be required, if the line were then to be constructed, may, by notice in writing, require the Postmaster-General to remove the line within three months, and if the notice is not withdrawn, the Postmaster-General must remove the line, unless within those three months he serves a counter-notice requiring such person to consent to the line remaining (1945 Act, s. 24).

If such a counter-notice is served, then (a) a difference is deemed to have arisen between the Postmaster-General and that person, and (b) the provisions of sections 3, 4 and 5 of the Telegraph Act, 1878, and of section 1 of the Telegraph (Construction) Act, 1916, which provide for the determination of differences as to the placing of telegraphs, posts and telegraphic lines, apply with the necessary adaptations, as if the difference arose under the said Act of 1878, and (c) the Postmaster-General need not remove the lines until three months after the time for appealing from the decision upon such difference has expired or, where an appeal is brought, the appeal is finally determined (1495 Act, s. 24).

Deep Lines.—Where any telegraphic line constructed by the Postmaster-General in the exercise of emergency powers consists, for the greater part of its course, of a tunnel containing wires used for the purpose of telegraphic communication and running at a depth of more than thirty feet below ground level, no compensation is payable by reason of its construction, maintenance or use (section 25 (1), (5)). The level of the ground is to be taken in its natural state (section 25 (5)). If the ground is covered with water the level of the ground is to be taken as the surface of that water and, where the water is tidal, at high tide on an ordinary spring tide (section 25 (5)).

To such a tunnel no obligation on the Postmaster-General or power conferred on any person, however arising, to remove or alter a telegraphic line, applies; but where after the end of the period during which the Emergency Powers (Defence) Act, 1939, is in force, any person proves that he would, but for the above provisions, have power to alter, or require the removal or alteration of, any part of such a tunnel and no compensation has been paid in respect of it, the Postmaster-General must pay to him, and to every other person then having an estate or interest in the land through or under which that tunnel passes, the amount by which the values of their respective estates are diminished by the removal of the said obligation or the said power (1945 Act, s. 25 (2) and section 59 (1)). Such amount is to be determined in accordance with section 7 of the Telegraph Act, 1863, as amended under any subsequent enactment (1945 Act, s. 25 (4).

Similarly, if any work done, during the period during which the Emergency Powers (Defence) Act, 1939, is in force, for any purposes connected with any war in which His Majesty is or may be engaged is constructed below the surface of any land in connection with the construction of, but not forming part of, such a tunnel, and remains in the land after the completion of the tunnel, and any person having an estate or interest in the land proves that that work is likely to interfere with any existing or proposed works of his, then, unless compensation has already been paid, the Postmaster-General must pay to him and to every other person then having an estate or interest in the land the amount by which the values of their respective estates are diminished by the presence of such work (section 25 (3) and section 59 (1)). Such amount is to be determined in accordance with section 7 of the Telegraph Act, 1863, as amended under any subsequent enactment (section 25 (4)).

New Temporary Procedure for Acquisition of Land by Local Authorities.

Where under a regulation made under the Emergency Powers (Defence) Act, 1939, or the Emergency Powers (Defence) Acts, 1939 and 1940, a county council, county borough, metropolitan borough. or urban or rural district, or the Common Council of the City of London or any combination of those authorities have been directed to do work on, or authorised to use, any land for a purpose for which they can acquire land compulsorily, a Minister may authorise them to purchase all or any part of the land compulsorily for that purpose by confirming an order to be made by them (1945 Act, s. 26 (1) and section 59 (1)). If the purpose was the construction or improvement of a highway the Minister to confirm the order is the Minister of War Transport; if the purpose was the performance of any of their functions under the Civil Defence Acts, 1937 and 1939, the Minister to confirm the order is the Home Secretary if the Minister of Home Security gave the direction or authority, but is the Minister of Health if that Minister gave the direction or authority; if the purpose was educational, the Minister of Education; in other cases the Minister of Health (1945 Act, s. 26 (1) and section 59 (1)). But a notice to treat for the acquisition of the land must be given before the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, remains in force (1945 Act, s. 26 (1), proviso, and section 59 (1)).

Where under such a regulation an authority other than those named above has done work or used any land for the purpose of a police force, but one of the authorities named above is or can be authorised under any Act to acquire land compulsorily for the purpose of that force, the work done on, or the use made of, that land by the said other authority is deemed to be work done on, or use made of, that land by the one of the authorities named above so authorised or capable of being so authorised (section 26 (2)).

Compulsory Purchase Orders.—The purchase of land by any of the authorised authorities or combination of authorities, other than

authorities in the administrative County of London, takes place under the following conditions (section 27) :—

Form of Order. The order must be in a prescribed form and must describe by reference to a map the land to which it applies, and must incorporate the provisions relating to compulsory purchase of the Land Clauses Acts, except section 92 and sections 127 to 132 of the Land Clauses Act, 1845, and by determination of the Minister, section 133 of that Act, with certain modifications, namely, (1) that the words relating to sureties in section 85 are omitted, and (2) for section 92 is substituted the following : No person shall be required to sell part only of any house, building or manufactory, or of any land which forms part of a park or garden belonging to a house if he is willing and able to sell the whole of the house, building, manufactory, park or garden, unless the tribunal by whom compensation is to be assessed determine that in the case of the house, building or manufactory, such part as is proposed to be taken can be taken without material detriment to the house, building or manufactory, or, in the case of a park or garden, that such part as aforesaid can be taken without seriously affecting the amenity or convenience of the house, and if the tribunal so determine, compensation shall be awarded in respect of the severance of the part so proposed to be taken in addition to the value of that part, and thereupon the person interested is required to sell to the local authority that part of the house, building, manufactory, park or garden (Local Government Act, 1933, s. 161 (2) and Sixth Schedule). Where any land to which an order relates is glebe land, or other land belonging to an ecclesiastical benefice, the order must provide that sums agreed upon or awarded for the purchase of the land, or to be paid by way of compensation for damage to be sustained by the owner by reason of severance or injury affecting the land, be paid to the Ecclesiastical Commissioners, to be applied by them as money paid to them upon a sale, under the provisions of the Ecclesiastical Leasing Acts, of land belonging to a benefice. The order must also incorporate sections 77 to 85 of the Railway Clauses Consolidation Act, 1845 (Local Government Act, 1933, s. 161 (2) and Sixth Schedule).

Notices. Before submitting the order to the Minister the authority must (a) publish in a local newspaper a notice stating that the order has been made and the purpose for which the land is required, describing the land, and name a place where a copy of the order and the map may be inspected; and (b) serve on every owner, lessee and occupier (except tenants for a month or less) of any land comprised in the order a notice in the prescribed form stating the effect of the order and that it is about to be submitted to the Minister for confirmation and specifying the time within which and the manner in which objections can be made (Local Government Act, 1933, s. 161 (3)). But if work has been done on the land by the acquiring authority or combination of authorities, the Minister may waive or modify this provision as to notices (1945 Act, s. 27 (1) (c)).

Local inquiry. If any objection is duly made and not withdrawn, the Minister must before confirming the order, cause a local inquiry to be held, unless work has been done on the land by the acquiring

authority or combination of authorities, or he is satisfied that every such objection relates exclusively to matters which can be dealt with by the tribunal by whom the compensation is assessed (Local Government Act, 1933, s. 161 (4) (a)), in which cases he may confirm the order without causing a local inquiry to be held (1945 Act, s. 27 (1) (c)).

Modifications. No modification of the order introduced by the Minister can authorise the compulsory purchase of any land whose purchase would not have been authorised if the order had been confirmed without modification (Local Government Act, 1933, s. 161 (4) (b)).

Validity of Orders. If any aggrieved person desires to question the validity of the order, he may, within two months of the due publication of the notice of confirmation, apply to the High Court, and if the Court are satisfied that the order is invalid, and where the invalidity arises from failure in the due procedure, are further satisfied that the applicant's interests have been substantially prejudiced by such failure, the Court may quash the order either generally or as it affects the applicant's property (Local Government Act, 1933, s. 162 (1)). This is the only way in which the validity of such an order can be questioned legally (*ibid.*, section 162 (2)). Except by leave of the Court of Appeal no appeal lies to the House of Lords (*ibid.*, section 162 (3)).

Temporary Powers for Maintenance, Use and Removal of Works.

Maintenance and Use of Works.—Where works, done during the period during which the Emergency Powers (Defence) Act, 1939, is in force, have been constructed on any land for war purposes by, or by arrangement with, a Minister, or under emergency powers, any Minister may maintain and use, or authorise the maintenance and use of, those works for the purposes of the public service or for any purpose for which they were maintained or used in the exercise of emergency powers (1945 Act, s. 28 (1)).

Continuance in Possession.—Any Minister may retain, or authorise the retention of possession of, any land which is in his possession or in that of any person occupying or using it under his authority, notwithstanding the determination of any other right thereto, and, where possession is thus retained, any Minister may use or authorise its use for the purposes of the public service or in any manner in which it was being used immediately before possession was so retained (section 28 (2)). But if notice to treat has been given, the Minister may authorise the use of the land by any person in any manner and for any purpose, but if he does so the notice to treat cannot be withdrawn (section 28 (2), proviso). Power to withdraw is given by section 5 (2) of the Acquisition of Land (Assessment of Compensation) Act, 1919.

Ancillary Advantages.—Any such person having the use of works or land may continue to exercise and enjoy all such rights and advantages as, immediately before the use authorised by the Minister began, were being exercised or enjoyed in connection with the use of the works

or land for war purposes by the person then having the use thereof, including rights and advantages of taking water (section 28 (3) (a)).

Any orders made under Defence Regulations in connection with such use of works or land in force before the use authorised by the Minister began, including any order authorising the taking of water, remain in force, except in so far as revoked in relation to such works or land by order of the Minister using them or authorising their use (section 28 (3) (b)).

Removal of Works and Restoration of Land.—Where land has been diminished in value by damage caused by any use to which that land has been put during the period during which the Emergency Powers (Defence) Act, 1939, was in force, any Minister, or any person acting under the authority of any Minister, has power, and is deemed always to have had power, as against all persons interested in the land, to take the following steps :—

(a) remove any works, including buildings, structures and improvements, underground works and telegraph lines, placed on, over or below the surface of the land, provided that an amount has not been paid to a Minister in respect of them in pursuance of a report of the Commission, or an agreement in writing made by or on behalf of any Minister with any person then having an interest in the land, containing a specific provision that the works should belong permanently to that person;

(b) do such work on the land as he thinks fit for the purpose of restoring the land wholly or partially to the condition in which it was before the work was done or the damage caused;

(c) enter upon land of which he is not in possession for purposes named in (a) or (b), if reasonable notice of the intended entry is given to the occupier (1945 Act, s. 29 (1)).

Where any land is damaged in the exercise of such power of entry, the Minister must pay such compensation as may be just to the persons interested in the land, and any dispute as to such compensation is to be decided by the General Claims Tribunal constituted under the Compensation (Defence) Act, 1939 (s. 29 (2)).

Apart from the operation of any Defence Regulation, no person, (other than a constable or servant of His Majesty acting in the course of his duty) may, except with permission granted by or on behalf of a Minister, remove, alter or tamper with anything which a Minister has power to remove as aforesaid (section 29 (3)).

Duration of Powers of Maintenance, Use, etc.—All these new temporary powers cease, subject to certain exceptions, on the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, is in force (1945 Act, s. 30 (1)).

Any right to exercise the said powers which arises by reason of anything done on land while in the possession of a Minister, or of a person occupying or using it under the authority of a Minister, ceases when the land is no longer in the possession of a Minister or of any such person, unless during such possession the Minister serves notice on the person entitled to receive any rent or compensation in the nature

of rent in respect of such possession, reserving the rights conferred in relation to that land relating to the removal of works or the restoring of land (under section 29), and publishes such notice in such manner as he thinks best for informing any other persons affected (section 30 (2)).

Where work has been done on land while not in the possession of a Minister or of a person occupying or using it under the authority of a Minister, any right to exercise the aforesaid powers arising from the doing of the work ceases after any person has become entitled to receive from the Crown a lump sum by way of compensation in respect of the doing of the work (section 30 (2)), unless proceedings, commenced within two years of the end of the period during which the Emergency Powers (Defence) Act, 1939, is in force, for the acquisition of any land by a Minister or other before-named authority are abandoned otherwise than by the giving of an undertaking in pursuance of a report of the Commission, in which case the powers remain available for six months after the abandonment. Proceedings for the acquisition of land are deemed to have commenced if notice to treat has been given or a Minister's proposals for acquisition have been duly published (section 30 (4)).

Powers of Maintenance, Use, etc., Deemed Exercisable under Defence Regulations.—These new temporary powers are deemed to be and always to have been powers exercisable under Defence Regulations, for the purposes of the Compensation (Defence) Act, 1939 : the Landlord and Tenant (Requisitioned Land) Acts, 1942 and 1944 : and the War Damage Act, 1943, so far as it relates to requisitioned land or to work done on lands under emergency (1945 Act, s. 31 (1), (4)).

Compensation for Maintenance, Use, etc.—Compensation under the Compensation (Defence) Act, 1939, s. 2, in respect of taking possession of land is extended to the retention of land under the temporary powers, by treating the original taking and the retention as one transaction (1945 Act, s. 31 (2)).

The like compensation is payable in respect of the exercise of the new temporary powers, as would have been payable if these powers had been exercised under Defence Regulations, if the compensation would be payable otherwise than under the Compensation (Defence) Act, or under that Act but subject to modifications (1945 Act, s. 31 (3)).

Adjustment of Compensation on Acquisition of Land.

Cases to which Part VIII Applies.—Changes are made by Part VIII of the Act (sections 40–44) in the assessment of compensation in certain specified cases, namely :—

(A) If a notice to treat is given between June 15, 1945, and the expiration of two years from the end of the period during which the Emergency Powers (Defence) Act, 1939, is in force, or is given by the Minister of Agriculture and Fisheries under his power to buy requisitioned land (see Agriculture (Miscellaneous Provisions) Act, 1941, s. 9), or under Part II of the 1945 Act (p. 31, *ante*), and if. in any of these

cases, land is compulsorily acquired (a) by a Minister, or (b) by a local authority or combination of local authorities either (1) under Part V of the 1945 Act (p. 42, *ante*), or (2) otherwise than under such new temporary procedure, the land being at the date of the notice to treat in the possession of a Minister or of a person acting under his authority under emergency powers, or (c) by a Drainage Board, the land being at the date of the notice to treat in the possession of, or in use for the purposes of, that Board.

(B) Where a restriction is discharged or modified under Part II of the 1945 Act (p. 31, *ante*) or under the Defence Acts an easement over, or restrictive of the user of, land is acquired (1945 Act, s. 40).

Elimination of Value due to Government War Work, etc.—The following are the changes:—

In valuing acquired land for compensation, any increase or diminution of value attributable directly or indirectly to any of the following factors must be allowed for, namely—(a) any damage to that land, or to any adjacent land while that land, during the period during which the Emergency Powers (Defence) Act, 1939, was in force, was in possession of a Minister or of a person occupying or using it under his authority, unless the land consists of or includes any part of a hereditament in respect of which a war damage payment is to be made under the War Damage Act, 1943, in which case war damage not made good at the date of the notice to treat is to be excluded (1945 Act, s. 41 (5) (a)); (b) any work done after August 25, 1939, on that land or any adjacent land by or by arrangement with a Minister or the acquiring authority or in the exercise of emergency powers; (c) any prohibition or restriction imposed under emergency powers on the doing of any work on that land or adjacent land (section 41 (1)). But in assessing compensation for injurious affection of other land, account must be taken of the actual state and circumstances of the acquired land at the date of the notice to treat, in so far as they may be expected to continue (section 41 (1), proviso).

And if the acquired land, or any adjacent land, consists of or includes any part of a hereditament in respect of which a value payment is to be made under the War Damage Act, 1943, and that payment is to be computed under section 17 of that Act by reference to the state of the land before the requisition, the above provisions do not apply to any change in the hereditament which affects that computation (1945 Act, s. 41 (5)).

Also if any such work (see clause (b) above) was done wholly or partly at the expense of, or in pursuance of an agreement with, any person having an interest in the acquired land, any increase of value attributable to his expenditure or to consideration moving from him must be taken into account (section 41 (2)).

If a payment (see p. 29, *ante*) in respect of the value of any works has been made to a Minister as a result of a report by the War Works Commission, any increase in value attributable to the construction of the works must be taken into account (section 41 (3)).

Moreover, if work has been done under such circumstances that, under the War Damage Act, 1943, ss. 7 and 8, a cost of works payment by the War Damage Commission is appropriate, that work, if done at

any time after August 25, 1939, on the acquired land, or any adjacent land, by, or by arrangement with, a Minister or the acquiring authority or in the exercise of emergency powers, is not a subject of adjustment of compensation unless the work included alterations or additions and the cost of the work exceeded the permissible amount payable by the War Damage Commission under sections 7 and 8 of the War Damage Act, 1943, in which case such deduction as may be just is to be made from the compensation in respect of any additional value of the land ascribable to the excess above such permissible amount (1945 Act, s. 41 (4)).

Where Part II of Town and Country Planning Act, 1944, *Applies.*—None of the above provisions (*i.e.*, those in section 41 of the 1945 Act) apply to a supplement to compensation under Part II of the Town and Country Planning Act, 1944, but in case of any interest in land, on the questions whether any, and the amount of, supplementary grant should be made, any changes in the land attributable to the above-mentioned factors (*i.e.*, those in section 41 (1) of the 1945 Act) must to such extent as is reasonable be left out of account (1945 Act, s. 41 (7)).

Easements and Restrictions.—As regards compensation for the acquisition of an easement or restrictive right or for the discharge or modification of a restriction, the above provisions apply, except that for references to acquired land are to be substituted references to the land the value of which is diminished (section 41 (8) (a)); the provision in regard to compensation for injurious affection (section 41 (1), proviso) does not apply (section 41 (8) (b)), the supplement to compensation under Part II of the Town and Country Planning Act, 1944, is treated as if it were compensation for damage sustained within five years from November 17, 1944, by reason of land being injuriously affected by the execution of works (section 41 (8) (c)).

Adjustment where Compensation Payable under other Provisions.—Adjustment of compensation in the above-named cases (*i.e.*, under Part VIII of the 1945 Act) is to be made if the claimant has been paid, or has a right to, compensation because of the exercise of emergency powers (section 42 (1)), and such adjustment may take the form of a direction by the arbitrator that the compensation shall be wholly or partly conditional on his relinquishing to a specified extent any right to compensation arising from the exercise of emergency powers (section 42 (2)).

Forfeitures.—If by the exercise of emergency powers an interest in land has, or might, become forfeited, the compensation is to be based on the assumption that no such forfeiture or liability to forfeiture has, or might, take place (section 43).

Repeals.—Sub-sections (3) and (4) of section 9 and paragraph 3 of the Fourth Schedule to the Agriculture (Miscellaneous Provisions) Act, 1941, and paragraphs 3 and 4 of the Agriculture (Miscellaneous Provisions) Act, 1943, which apply to compulsory purchase of land.

are repealed (1945 Act, s. 44). The repealed provisions have been rendered superfluous by Part II of the Town and Country Planning Act, 1944, and Part VIII of the 1945 Act.

Amendments of Compensation (Defence) Act, 1939.

Increase in Rental Compensation.—If before June 15, 1945, possession was taken of any land and the compensation rental under section 2 (1) (a) of the Compensation (Defence) Act, 1939, has been determined by reference to rental values, both (a) less than those obtaining on March 31, 1939, for comparable land, and (b) less than those obtaining on a day to be appointed by the Treasury, any such compensation which accrues on or after that day must be determined by reference to rental values obtaining on March 31, 1939, or on the appointed day, whichever is the lower (1945 Act, s. 45 (1), (2)), if, but only if, not later than six months after the appointed day or after six months from the derequisitioning of the land, whichever is the later, some person entitled on or after the appointed day would have been entitled to occupation but for the requisitioning, gives notice as prescribed by rules to be made by the Treasury that he so desires (section 45 (1), proviso).

Definition of Work done on Land.—For the purposes of the Compensation (Defence) Act, 1939, "the doing of work on land" means the doing of any work on, over or below the surface of the land, and, in particular, includes the making of any erection or excavation, the placing of any thing, and the maintenance, removal, demolition, pulling down, destruction or rendering useless of any thing, on, over or below that surface (1945 Act, s. 50).

Effect of Reservation of Rights of Removal or Restoration.—If a Minister by a notice under Part VI of the 1945 Act (see section 30, p. 45, *ante*) reserves his rights to remove works constructed, or things placed, on, over or below the surface of, or to do other work for the purpose of restoring land in his possession or in that of a person occupying or using it under his authority, then, on the land ceasing to be in the possession of a Minister or of such person as aforesaid, compensation is payable as if the damage had been damage to the land by work done thereon while it was not in the possession of a Minister or of such person as aforesaid. In other words compensation becomes payable under section 3 of the Compensation (Defence) Act, 1939, and not under section 2 (1) (b) thereof (1945 Act, s. 46).

Compensation for Removal of Fixed Machinery and Plant.—Where the damage consists wholly or in part of the removal of fixed machinery or plant, such reduction in the compensation payable under section 2 (1) (b) of the Compensation (Defence) Act, 1939, is to be made as appears to the General Claims Tribunal to be just, having regard to the way in which the machinery or plant has in fact been dealt with, the likelihood of machinery or plant being replaced, and the reasonableness of replacing it on the land, and any other relevant circumstances (1945 Act, s. 47). But no such reduction is to be

made if it would be inconsistent with any term of an agreement for payment apart from statute such as is mentioned in section 15 of the Compensation (Defence) Act, 1939 (1945 Act, s. 47, proviso).

The General Claims Tribunal above mentioned was appointed under section 8 of the Compensation (Defence) Act, 1939. Arthur Moon, Esq., K.C., is the present chairman.

Successive Works to be Dealt with as one.—The doing of any work on land for which compensation would be payable under section 3 of the Compensation (Defence) Act, 1939, if the annual value of the land were diminished thereby, is treated as a single operation with the doing of any other such work, unless in respect of the earlier work (a) any person has become entitled to receive from the Crown a lump sum under section 3 (3) of the Compensation (Defence) Act, 1939, or under an agreement by way of compensation, or (b) an amount has been paid to a Minister in pursuance of a report of the War Works Commission under section 10 of the 1945 Act, and on the doing of the later work, the General Claims Tribunal may, on the application of the Crown or of any other person interested, vary any award in respect of the earlier work, except as to compensation accruing before the doing of the later work (1945 Act, s. 48 (1)). But this power to vary awards applies only to awards made before June 15, 1945, unless (whether before or after that date) further such work has been done on that land since the latest work to which any such award relates (1945 Act, s. 48 (1), proviso).

These provisions apply also in the case of any works constructed, or other thing placed, in, on, or over any land by, or by arrangement with, a Minister otherwise than in the exercise of emergency powers, unless it has been expressly agreed that the Crown is to have no interest in such works or thing, or such works or thing have been so constructed or placed in the exercise of statutory powers (section 48 (2)).

Lump Sum Compensation.—In cases in which the Crown is to pay a lump sum instead of restoring land to its former condition, it is not to be assumed that the land cannot be restored to the condition in which it would be but for the doing of the work (1945 Act, s. 49, and Compensation (Defence) Act, 1939, s. 3 (6)).

Miscellaneous and General.

Saving for Agreements.—Where, before or after June 15, 1945, (a) after the construction of any work done, during the period during which the Emergency Powers (Defence) Act, 1939, is in force, for war purposes or by arrangement with a Minister or under emergency powers, on any land or with a view to their construction, a lease of that land has been granted to a Minister; or (b) in connection with the construction of such works, an agreement in writing has been made by or on behalf of any Minister providing for the grant to the Minister of the freehold or a leasehold interest in that land, no Minister has, by reason only of the construction of the works, a right as against the lessor or intended grantor, or their successors in title, to acquire under Part II of the 1945 Act, any interest in or rights over that land compulsorily (section 51 (1)).

Where in connection with the construction of any such works an agreement in writing has been made by or on behalf of any Minister with any person having an interest in the land, and that agreement contains (a) a specific provision that on fulfilment of some condition, the works should belong to that person permanently, or (b) a specific provision requiring the removal of the works or the restoration of the land, no one has, by reason only of the construction of the works, a right as against that person or his successors in title, to acquire any interest in or rights over that land compulsorily if the acquisition would defeat that specific provision (section 51 (2)).

Nor where, in connection with the construction of any such works, an undertaking in writing that the works shall be removed or the land restored has been given by or on behalf of a Minister, to any society or body concerned with the preservation of public amenities or to any local authority, has anyone, by reason only of the construction of the works, a right to acquire any interest in or rights over the land under Part II or Part V of the 1945 Act without the consent of that society, body or authority (section 51 (3)).

But these provisions do not apply to the right of acquisition by a Minister, under Part II of the 1945 Act, of an easement over, or right restrictive of the use of, any other land (section 51 (4)).

Cost of Rehabilitation of Land.—If land has been damaged by work done during the period during which the Emergency Powers (Defence) Act, 1939, is in force, for war purposes or by arrangement with a Minister or under emergency powers, and (a) a person has, in pursuance of a report by the War Works Commission, given an undertaking to deal with the land in a particular manner with a view to its rehabilitation; or (b) in a Minister's opinion it is expedient in the public interest that the land should be so dealt with, the Minister may undertake to pay to any person interested in the land any part of any expenses incurred in dealing with the land in that manner, in so far as such expenses exceed any sum payable as compensation under the Compensation (Defence) Act, 1939, s. 2 (1) (b), for the damage (1945 Act, s. 52 (1)). Any work the expenses of which are thus paid is deemed to have been done for the purposes of section 3 of the Compensation (Defence) Act, 1939, by a person acting on behalf of His Majesty (1945 Act, s. 52 (2)).

Provision of Land in lieu of Land Acquired under Defence Acts.—Where a Minister proposes to acquire any land under the Defence Acts, he may acquire under those Acts by agreement any other land with a view to giving it in exchange; or if the first-mentioned land includes any part of a common to which the public have access, or of any open space, he may purchase land with a view to its substitution for the first-mentioned land (1945 Act, s. 53 (1)).

If he provides land in substitution for such first-mentioned land which forms part of a common, open space or any allotment set out as a fuel allotment, or a field garden allotment, under an Inclosure Act, he may by order provide for vesting the substituted land in the persons in whom the other land was vested, subject to the same rights, trusts and incidents as attached to that other land (section 53 (2)).

But if the substituted land is provided otherwise than by way of exchange, the persons in whom the substituted land is to be vested, and the rights, trusts and incidents may be specified in the order, provided that the rights, trusts and incidents are in the Minister's opinion as nearly the same as before, so far as regards the rights of the public (section 53 (2), proviso).

Purchase by Drainage Boards.—If a Drainage Board proposes to purchase under the Land Drainage Act, 1930, land which by the exercise of emergency powers either is in their possession or is being used by them for the purposes of that Act, the Minister of Agriculture and Fisheries may (a) direct that paragraph 4 of the Fourth Schedule to the Act of 1930 relating to the publication and service of notices authorising compulsory purchase shall not apply or shall apply subject to modifications, and (b) he may confirm the order authorising the acquisition of the land without a public inquiry (1945 Act, s. 55).

Evidence.—A certificate by any Minister upon almost any matter relating to work done on land, use made of land, and occupation of land is evidence of the facts stated in the certificate (section 58 (1)). And every document purporting to be a certificate and to be signed by a Minister or other person having authority to give such certificate is deemed, until the contrary is proved, to be such a certificate, and similarly a certified copy of a certificate is, unless the contrary is proved, sufficient evidence of the certificate (section 58 (2)).

There are provisions for the modification of the Act in relation to Scotland (section 60) and to Northern Ireland (section 61).

NOTES OF RECENT CASES.

1. *PROPERTY AND CONVEYANCING CASES.*

Fall of trees on to highway—nuisance—duty of inspection.—Though it is a case in tort it is a matter of great interest to landowners that Singleton, J., has once again drawn the attention of property owners to the duty owed by them to members of the public regarding the safety of trees. In *Cunliffe* v. *Bankes,* [1945] 1 A. E. R. 459, a cyclist was killed by the fall of an elm tree on to the highway causing an obstruction into which the cyclist rode in the dark. The elm tree had fallen due to disease caused by honey fungus (which is not peculiar to elms) which spreads from the roots up and causes decay inside the bark until finally it strips off. On the evidence in this case the Judge held that the tree had been regularly inspected by the agent and that there were no evident signs of disease and *so* there was no liability either in nuisance or negligence. In nuisance the landowner will only be responsible if either he directly causes it or he allows it to arise or he omits to remedy it within a reasonable time: *Noble* v. *Harrison,* [1926] 2 K. B. 332. This case should be compared with *Leanse* v. *Egerton,* [1943] K. B. 323, where the occupier of a dwelling-house was liable for glass falling from a window damaged by air raid, on

the basis of " presumed knowledge " after a day or two, and with *Perry* v. *Sharon* (1937), where the purchaser of a wood was held not liable to a ploughman on a neighbouring field for the fall of a tree of which condition he did not know.

Settlement—joint tenancy—Judicature Act, 1925.—*Smith* v. *Smith,* [1945] 1 A. E. R. 584, is primarily concerned with the law of divorce, but it is, again, a matter of general interest to conveyancers. Here a conveyance had been taken in the name of husband and wife, as joint tenants, the wife not having found any part of the consideration. The husband petitioner claimed that it was a settlement that could be varied by the Court and the wife respondent that it was a gift. Denning, J., held that the joint tenancy constituted a settlement for the purposes of the Act, because it constituted a continuing provision by way of a house for the benefit of the spouses: *Bosworthwick* v. *Bosworthwick,* [1927] P. 64; *Prinsep* v. *Prinsep,* [1929] P. 225. The fact that the wife was free to assign her interest did not make it any the less a settlement. It is, of course, a question of the merits whether any variation will be made.

The learned Judge also expressed the opinion that if variation was ordered it was not appropriate to treat the wife as dead but to vary the trusts of the proceeds of sale. It is submitted, with respect, that this is likely, if it stood alone, to cause difficulty with future title, and that coupled with it should be an order substituting another trustee or, alternatively, a direction that the joint tenants should convey to the person solely entitled to the proceeds of sale if such a person existed. Not to do this might be very inconvenient.

Charity—promotion of emigration—public trusts limited to locality but not to poor persons.—A trust to assist persons from a specified locality to emigrate to improve their condition in life may be a good charitable trust. This was the short point in *Re Tree,* [1945] 2 A. E. R. 65. This was held by Evershed, J., notwithstanding that a trust to promote emigration, *simpliciter,* is not a charitable trust: *Re Sidney,* [1908] 1 Ch. 488, because there is nothing to show that it is designed to confer any benefit on any section of the community. Furthermore, the absence of any reference to poor persons would, apparently, defeat such a trust, since it could assist rich as well as poor, if it were purely a personal trust: *Re Compton,* [1945] Ch. 123 (noted *ante,* vol. 9, p. 152), distinguished by the learned Judge; apart from some condition which gave to it a public character. In this case the public character attached from its association with a locality, namely, Hastings. In this respect it shows some similarity with *Re Baynes,* [1944] 2 A. E. R. 579 (noted *ante,* vol. 9, p. 224, but not cited), where the " common fund " acquired its charitable character from its association with a locality.

We feel that there is real need to clarify this issue of locality, because gifts, *e.g.,* for parochial purposes, are just as much designed to benefit persons associated with a locality as either " a common fund " or " emigration " from the locality. It cannot be that every purpose associated with a locality is *ipso facto* charitable.

Contract of sale—memorandum signed by auctioneer—duration of authority.—The authority of the auctioneer to sign a memorandum of sale for property sold at auction is usually stated to be an implied authority

as part of the transaction. As it is put in *Halsbury*, 2nd ed., vol. 1, p. 699, para. 1150, cited by Romer, J.: "It must be exercised at the time of the sale or while the transaction of sale is still in being and the auctioneer has no authority to sign on a subsequent day or on a sale otherwise than by auction". *Phillips* v. *Butler*, [1945] 2 A. E. R. 258, provides an interesting commentary on not taking these words too literally. At a sale by auction the auctioneer signed the usual memorandum at the conclusion of the sale, but the purchaser not having his cheque book with him, did not in fact pay the deposit until the following day though the memorandum purported to contain a receipt for it and notwithstanding a common form condition requiring the deposit to be paid immediately. Actually the purchaser was known to the auctioneer, and the learned Judge held as a fact that the conduct of the auctioneer in trusting him was reasonable. The authority to sign the memorandum was probably revoked to the knowledge of the auctioneer before the deposit was received. Romer, J., held that there was a perfectly valid memorandum of sale and that the authority of the auctioneer was sufficient. He said (at p. 263): "I think . . . it is plain that under certain circumstances, and in order to achieve certain purposes, the authority of an auctioneer has no specific duration but must be regarded and treated as lasting throughout the transaction of sale, and obviously it must be a matter of great difficulty at times to determine whether there has been a break such as to prevent it from being said that the signature by the auctioneer is made during the subsistence of the transaction of sale".

(1 K. & E., p. 343, note (*q*).)

Personal property—rights of finder in requisitioned house—possession.—For theorists *Hannah* v. *Peel*, [1945] 2 A. E. R. 288, will no doubt prove a happy hunting ground since it raises the awkward problem of what constitutes possession of personalty in a house or other realty, and it may be of some practical interest because of the particular facts. A soldier found a brooch in the crevice of a window sill in a requisitioned house which was empty at the time of requisition and which had never been occupied by the owner. Birkett, J., held that the soldier was entitled to the brooch as against the owner of the house. He held, following what he conceived to be the principle in *Bridges* v. *Hawkesworth* (1851), 15 Jur. 1079, that there was no *de facto* control of the brooch which was in no sense attached to the land and, therefore, there was never any possession which would constitute a title as against all but the true owner: *Armory* v. *Delamirie* (1722), 1 Stra. 505. The learned Judge could distinguish both *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44, and *Elwes* v. *Brigg Gas Co.*, 33 Ch. D. 562. The former on the ground that the finder found for his employer and not himself, and the second apparently because the prehistoric boat was attached to or under the land. The learned Judge does not seem to have decided whether he preferred the opinion of Holmes in his *Common Law* that a man may possess everything on his land because he intends to exclude others, or the opinion of Pollock in *Pollock and Wright on Possession*, that possession depends on *de facto* control. In this case the issue did not arise, because clearly after requisition there could not be a question either of *de facto* control or intention to exclude others. It remains a question of fundamental importance whether possession can in law exist of something which is not even expected to be on the land.

Settlement—protective trusts—payment to receiver under Lunacy Acts.—In *Re Custance's Settlement,* 61 T. L. R. 541, the question was whether payment to a receiver under the Lunacy Acts operated to determine a life interest subject to protective trusts. The settlement was created prior to 1926 and the operative words of divesting were, apparently, "When his estate or interest would, if an absolute interest, have become by reason of any act or event (other than the exercise of a power) vested or charged in favour of some other person or persons or a corporation". Cohen, J., held that the payment of a percentage to the receiver operated as a charge and worked a forfeiture of the life interest, though the actual appointment did not, since the receiver was the agent of the lunatic and his receipt was in law the receipt of the lunatic: *Re Marshall,* [1920] 1 Ch. 284. The learned Judge distinguished *Re Tancred's Settlement,* [1903] 1 Ch. 715, where the life tenant authorised the agent to pay himself his charges, on the ground that the statutory percentage directed to be deducted was something more than the remuneration of the agent since it was applicable as part of the vote for the Supreme Court of Judicature.

The protective trusts under the Trustee Act, 1925, s. 33, are framed quite as widely, though slightly differently. They cover the life tenant doing any act or thing, or suffering any act or thing, or any event happening whereby the life tenant would be deprived of the right to receive the income or any part thereof. Therefore it is thought that a forfeiture would be worked in like case under the statutory protective trusts.

(2 K. & E., p. 577 n.)

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2. *WILL CASES.*

By J. H. C. Morris, B.C.L., M.A., of Gray's Inn, Barrister-at-Law.

Gift to children inter vivos—definition of "children"—perpetuity—cross-limitations—surplus income from settlement on death of settlor—rule in Howe v. *Lord Dartmouth.—Re Hey's Settlement,* 61 T. L. R. 334, is something of a conveyancer's nightmare, for the draftsman made a series of unfortunate blunders. In 1931 the testator in his lifetime made a settlement of a large block of shares. At that time he had a wife and one son and four daughters. During the lives of the settlor and his wife the trustees were directed to pay £300 per annum to each child and accumulate the surplus income. After the deaths of the settlor and his wife they were directed to pay the whole income equally to the children during their lives. Clause 1 (e) contained a substitutionary clause: it provided that "if any child shall die at any time leaving issue such issue shall stand in the place of such deceased child and take *per stirpes* the share of the income of the trust fund which such deceased child would have taken if he or she had lived". Clause 1 (f) contained the ultimate gift: it provided that after the death of the survivor of the settlor and his wife and of the last surviving child the capital and income and accumulations should be held on trust for the respective issue of the settlor's children then living in equal shares *per stirpes.*

The testator by his will settled his residue on trust for his wife for life with remainder to his children as therein mentioned. The will contained the usual power to postpone conversion and directed that the income of any property producing income should be applied as income and expressly negatived the rules in *Howe* v. *Dartmouth* (1802), 7 Ves. 137a, and *Allhusen* v. *Whittell* (1867), L. R. 4 Eq. 295, in all their branches. Various

questions arose on the death of the testator which may conveniently be summarised as follows:—

(1) There was nothing in the settlement to limit " children " to children born before the date of the settlement. Therefore the ultimate gift over after the death of the last surviving child was void for remoteness, for children might have been born after the date of the settlement and would not therefore have been lives in being. Had the settlement limited " children " to those already born, the trouble would have been avoided.

(2) The substitutionary clause did not expressly dispose of the share of income of a child dying before the date of distribution leaving no issue. It provided for the death of a child before the date of distribution leaving issue, but not for the event of the death of a child before that date without issue. The limitation for the lives of the children showed that the estates of deceased children were not intended to share. In these circumstances a gift of the deceased child's share of income to the surviving children and the issue of dead children has been implied: *Re Tate,* [1914] 2 Ch. 182, but that case is very difficult to reconcile with *Re Hobson,* [1912] 1 Ch. 626, which was not cited in *Re Tate.* Cohen, J., pointed out two very fine distinctions between *Re Tate* and *Re Hobson,* and said that he agreed with the reasoning in *Re Tate* and would imply cross-limitations in the case before him.

(3) The next difficulty was that the cross-limitations implied by the Court might themselves be void for remoteness. It is clear that an express limitation to the survivor of several unborn tenants for life is invalid: *Re Legh's Settlement Trusts,* [1938] Ch. 39; *Re Johnson's Settlement Trusts,* [1943] Ch. 341. And as children might have been born after the date of the settlement, clearly any cross-limitations implied in favour of those children would have been void. But it has been held that if the cross-limitations can be construed as separate directions as to the share of each child, they are valid as regards the share of any child born before the date of the settlement: *Re Russell,* [1895] 2 Ch. 698. Cohen, J., decided to imply the cross-limitations as separate directions, so as not to destroy them at the moment of their birth.

(4) The direction to accumulate surplus income was invalid during the period between the death of the settlor and the death of his wife, and the surplus income resulted to the settlor's estate.

(5) Was this resulting income arising during the life of the widow income " of " the testator's estate within the meaning of the clause in the will excluding the rule in *Howe* v. *Dartmouth,* or was it a terminable annuity and if so ought it to be capitalised?

(a) Cohen, J., held that although the payments were income of the settled fund they were not income of any property forming part of the testator's estate, but on the contrary they constituted in the aggregate an asset of the estate. Like the instalment payments payable by contract after the death of the testator in *Re Fisher,* [1943] Ch. 377, and *Re Payne,* (1944), 113 L. J. Ch. 46, they constituted the asset forming part of the estate and not the fruit of an asset forming part of the estate. There never was any tree belonging to the estate of which they were the fruit.

(b) On the question whether payments in the nature of a terminable annuity ought to be capitalised, the authorities are conflicting. Cohen, J., followed *Crawley* v. *Crawley* (1835,) 7 Sim 427, and *Re Whitehead,* [1894] 1 Ch. 678, in preference to *Re Sherry,* [1913] 2 Ch. 508, and *Re O'Hagan,* [1932] W. N. 188 (where the facts were very similar to those in the instant case) and decided that they ought to be capitalised. He did not accept Uthwatt, J.'s ingenious explanation of *Re O'Hagan* in *Re Payne,* that income " of " the estate means income which happens to be part of the estate and not income derived from the estate.

(c) Although the rule in *Howe* v. *Dartmouth* does not apply where there is a trust for conversion and a power to postpone conversion duly exercised, still the rule applies where there has been no exercise of the power to postpone conversion. Therefore, if the executors in the exercise of their discretion postponed the sale of resulting income, the same should as and when received be treated as capital and invested accordingly, the tenant for life receiving the income of the investments; but any income received before the executors determined to postpone the sale should be apportioned between capital and income in accordance with the principle of *Re Chesterfield's Trusts* (1883), 24 Ch. D. 643.

(Theobald 427, 449, 455, 457, 495.)

Construction—gift to children of A and B—whether children take per stirpes.—Exceedingly difficult questions of construction arise when a testator gives property "to be equally divided between the children of A and B". In the first place, does he mean the children of A and of B, or does he mean B and the children of A? According to a respectable line of authorities the *prima facie* grammatical construction of the words is that B and the children of A are entitled: *Re Featherstone's Trust* (1882), 22 Ch. D. 111; *Re Walbran,* [1906] 1 Ch. 64; *Re Harper,* [1914] 1 Ch. 70; *Re Prosser,* [1929] W. N. 85; *Re Cossentine,* [1933] Ch. 119; though there may be enough in the context and the surrounding circumstances to lead to the other conclusion. In the second place, if B and the children of A are entitled, do they take *per stirpes* or *per capita*? In *Re Walbran, supra,* Joyce, J., decided that they took *per stirpes* because etymologically "between" imports division into two moieties. His decision was followed by Clauson, J., in *Re Prosser, supra,* but without much enthusiasm. On the other hand, in *Re Harper, supra,* Sargant, J., decided that they took *per capita,* and his decision was followed by Maugham, J., in *Re Cossentine, supra,* who quoted from the *Oxford English Dictionary* to show that though "between" may have imported division into moieties in Anglo-Saxon times, the word had long since outgrown that meaning and was properly used to import division into more than two shares.

In *Re Alcock,* 61 T. L. R. 351, the testatrix gave her residue "to be equally divided between my nephew S. and the three children of my cousin who resides at 12 Milner Road Kingston-on-Thames absolutely". As there was no gift to the children of S. the first difficulty discussed above did not arise. But the testatrix's cousin had four children and not three, with all of whom the testatrix had been on friendly terms. Evershed, J., decided that "three" must have been a slip for "four" and that all four children were entitled. He next had to consider whether these four children and the nephew took *per stirpes* or *per capita,* or in other words whether the nephew took a half share or a fifth. In the existing state of the authorities the question was an embarrassing one. The learned Judge followed *Re Cossentine, supra,* and held that they took *per capita.* In these cases the Judges properly look at the surrounding circumstances, and in the present case the Judge thought he saw an indication of the testatrix's intention in the fact that S. and the four children were all of the same generation. Such indications are very slight and the Judges themselves admit that to rely on them is to indulge in guesswork. Still, it is thought that in most cases distribution *per capita* best accords with the intentions of testators; and if the present case establishes a *prima facie* rule to that effect it will have served a useful purpose. Any rule is better than none.

Re Daniel, [1945] 2 A. E. R. 101, also emphasises that *prima facie* a direction for equal division means distribution *per capita,* but neatly illustrates the displacement of the rule. The testatrix gave her residue to be

equally divided between her sister M (should she predecease the testatrix, her children were to benefit in her share), the children of her deceased sister E, and the children of her deceased brother T. M did not predecease the testatrix. Vaisey, J., held that the substitutionary direction affecting her share showed that distribution was to be *per stirpes*. The testatrix could not have intended that the size of the shares of the children of E and T should depend on the accident of whether M precedeased the testatrix.

(Theobald 264, 266, 268.)

Beneficiaries in enemy-occupied territory—forfeiture under forfeiture clause.—One of the unforeseen consequences of this war has been that beneficiaries residing in enemy-occupied territory are liable to forfeit interests in property held upon protective trusts under section 33 of the Trustee Act, 1925, because the income becomes payable to some other person, *i.e.*, the Custodian of Enemy Property: *Re Gourju,* [1943] Ch. 24; *Re Wittke,* [1944] Ch. 166. In *Re Hall,* [1944] Ch. 46, Uthwatt, J., found a way to avoid this result because the forfeiture clause was set out in the will and provided that forfeiture was to occur if the beneficiary should "do or suffer" any act or thing whereby the annuity would become vested in or payable to another person, and it could not be said that by merely continuing to live in France she had "done or suffered" anything. In *Re Harris,* 61 T. L. R. 364, the will provided that forfeiture should occur if the beneficiary should "commit, permit or suffer any act, default or process whereby the annuity would become vested in or payable to some other person". Vaisey, J., said that, though the language used was not the same as that used in *Re Hall,* still it was close enough to lead to the same conclusion. The only word which caused him any difficulty was "process"; but he did not think that that included the passing of the Trading with the Enemy Act, 1939, and the making of orders thereunder. [And see Conveyancer's Notebook, *ante,* p. 2.]

(Theobald 527.)

War Service—"service of testator"—revocation of legacies and effect on share of residue.—If a testator gives a legacy to a servant "if still in my employ and not under notice", is the servant entitled to the legacy if he has been called up to serve in the Army? The question arose in the last war and now it has arisen again. In *Re Cole,* [1919] 1 Ch. 218, it was held that a man who voluntarily enlisted in September, 1914, with the consent of the directors nevertheless remained in the employ of the company, irrespective of whether he was paid any salary during his war service. On the other hand in *Re Drake,* [1921] 2 Ch. 99, it was "most reluctantly" held that a servant's period of war service could not count as service with the testator for the purposes of a length-of-service qualifying clause, although it was clearly understood that his place would be kept open for him.

In *Re Feather,* [1945] 1 A. E. R. 552, the servant was called up in August, 1940. The testator agreed to pay him £2 a week while serving in the Army and allowed his wife to occupy a cottage rent free. During his periods of leave the servant helped the testator and was paid extra wages for doing so. One of the executors deposed that at an interview which he had with the testator he suggested that the testator should alter his will to

make it clear that the servant was still entitled to his legacy, but that the testator emphatically declared that the servant was still in his employ and therefore it was unnecessary to alter the will. Cohen, J., held that the question whether the servant was in the testator's employ was a question of fact and that the onus was on the servant to prove it; that the evidence of the executor was admissible on the authority of *Herbert* v. *Reid* (1810), 16 Ves. 481, not to prove the testator's intention but to prove the fact of employment; and that the servant had discharged the onus and was entitled to the legacy. On the facts this seems to be a very plain case. The question would have been much more difficult if the servant had simply been called up and had neither helped the testator during his leave periods nor been paid a retaining wage. If the question arises again it is to be hoped that the test adopted will be whether the testator intended to keep the servant's job open for him, and not whether the servant helped the testator during his leave periods, otherwise the effect will be to add one more disadvantage to service overseas. If the former test is adopted it may be that the Reinstatement in Civil Employment Act, 1944, will affect the question.

The testator also gave his residue to be divided "among such of the legatees hereinbefore named" as should be living at his death in such proportions as the amount of the residue should bear to the amount of the legacies. Two persons claimed to share in the residue, an annuitant and another servant who had left the testator's employ in 1938 and therefore admittedly forfeited his legacy. As regards the annuitant, Cohen, J., held that though the general rule is that legatees include annuitants, yet here there was a sufficient contrary intention because the testator referred to the "amount" of the legacies, and therefore the annuitant was not entitled to participate in residue. This seems rather a restrictive interpretation, because had it been necessary the value and therefore the "amount" of the annuity could easily have been calculated actuarially.

As regards the servant the question was more difficult. In *Re Florence* (1917), 87 L. J. Ch. 86, the testator gave legacies to charities and gave his residue between them in the proportions of their respective legacies. Later he revoked the legacies to some of the charities without saying anything about residue, yet it was held that all the charities were entitled to participate in residue on the principle that a revocation by codicil ought not to be allowed to disturb the will more than is necessary. It is very doubtful whether the application of this principle carried out the testator's intention; and the decision is difficult to reconcile with *Re Courtauld* (1882), 47 L. T. 647. Cohen, J., very properly refused to follow *Re Florence*, and held that the servant was not entitled to share in residue.

It may be noted that in *Re Picton*, [1944] Ch. 303 (not cited in *Re Feather*), Cohen, J., had once before refused to follow *Re Florence*. In that case the testator gave a number of legacies and gave his residue between all of them *pro rata* according to their legacies. Later he revoked seven legacies and "in lieu thereof" gave legacies of different amounts to five of the legatees and gave three new legacies to legatees who had not been mentioned previously. He did not refer to the residuary gift. It was held, (1) that the five legatees could participate in residue in the proportion of their substituted legacies, and so could the three new legatees; but that (2) the two legatees whose legacies were revoked could not. The results reached in *Re Picton* and *Re Feather* seem much more sensible than that in *Re Florence*, and it is to be hoped that the two later cases have relegated the earlier one to obscurity.

(Theobald 182, 248, 630.)

Wills of Irish soldiers and sailors.—The Irish Courts have recently been considering informal wills made by Irishmen serving in the British armed forces. Their decisions will be of value to those who are called upon to advise on the validity of such wills. Although probate has been granted in every reported case, the language of the Judges suggests that they might not be prepared to go so far as the English Courts did in *In the estate of Spark,* [1941] P. 115, and *Re Rowson* (1944), 171 L. T. 70, as to what constitutes actual military service. In view of the number of Irishmen serving in the British forces, it would obviously be a pity if Courts in the two countries differed radically in their interpretation of the law. From this point of view it is perhaps fortunate that the Irish Judges still treat English precedents with very great respect, a compliment which is not reciprocated so often as it deserves to be.

In *Doherty* v. *Mangan,* [1943] Ir. R. 78, the testator was a pilot officer in the R.A.F., and it was not disputed that he was on actual military service. In September, 1941, he wrote a letter from England to his solicitors in Dublin instructing them to prepare a will in favour of his sister. He added that if he married he should want his wife to benefit entirely, but that that was extremely unlikely " as I think marriage is essentially a peace-time occupation ". The will was duly prepared and sent to the testator, but he was killed next month before he could execute it. It was held that he was a " soldier " within the meaning of section 11 of the Wills Act, 1837, and that the letter to his solicitors could be admitted to probate as his last will. It is not often that a testator is held to be a " soldier " although he is not in the service of the State in which the Court is sitting. In *In bonis Donaldson* (1840), 2 Curt. 386, and *Shearman* v. *Pyke* (1724), 3 Curt. 539, the testators were in the service of the East India Company. The present case obviously extends this principle and is believed to be the first case in which a soldier's will has been upheld by the Courts of a neutral State.

Although Hanna, J., regarded *Doherty* v. *Mangan* as a very clear case, Maguire, P., in two subsequent cases indicated that had the question come before him for the first time he might have taken a different view; but in both cases he followed the previous decision. In *In bonis Anderson,* [1945] Ir. R. 179 n., the testator was a sailor in the Royal Navy under twenty-one years of age, and his will was admitted to probate under the Wills (Soldiers and Sailors) Act, 1918. In *In bonis Ryan,* [1945] Ir. R. 174, the testator was a sergeant in the Irish Guards. His will was made in barracks in Surrey on June 6, 1940, that is just after the evacuation from Dunkirk. An officer in the British War Effects Office deposed that on that date " the invasion of Great Britain was considered by the Army authorities to be imminent, and that every person was considered by the Army authorities to be a potential defender of Great Britain, and that every person in the country was considered by the Army authorities to be in danger from enemy action and to be in fact a mark for the enemy ". After some hesitation Maguire, P., held that the testator was in actual military service and admitted the will to probate.

It is fortunate that the Court did not apply the test suggested by Mr. Megarry in 57 L. Q. R. 481, namely, " Was the testator when he made his will either habitually serving at or under orders to proceed to a place in which, owing to a state of war, he would be exposed to perils greater than those affecting civilian life? " The expert evidence suggested that every person in Great Britain was in June, 1940, equally in danger from the enemy, and therefore it could not have been said that the testator was exposed to greater perils than a civilian.

Special power—appointment of life interest to non-object—acceleration.—Re Shekleton's Trusts, [1945] Ir. R. 115, is a neat illustration of the rule that the doctrine of acceleration does not apply to estates limited under powers of appointment. If a testator gives property to A for life and after his death to B, and the gift to A is void for any reason, for instance because A attests the will or predeceases the testator, or the gift to A is revoked or disclaimed, the remainder to B is accelerated and takes effect immediately on the testator's death: *Jull* v. *Jacobs* (1876,) 3 Ch. D. 703; *Re Clark* (1885), 31 Ch. D. 72; *Lainson* v. *Lainson* (1854), 5 D. M. & G. 754; *Re Hodge,* [1943] Ch. 300. But if the gift to B is limited in exercise of a special power of appointment, and the life interest to A fails because A is not an object of the power, the property goes as in default of appointment during A's life. Lord St. Leonards in *Crozier* v. *Crozier* (1843), 3 Dr. & War. 353, was careful to explain that the reason for the rule was not to be found in any technical distinction between property and power, but simply in the notion that that was the best way to carry out the testator's intention. *Re Shekleton's Trusts* shows that this may not necessarily be the case. The testator had a special power of appointment among his children. He appointed a life interest to his wife (who was not an object of the power) and "from and after her decease" to his daughter Margaret absolutely. He thereby showed as plainly as could be that his other daughter Helen was to take nothing. Yet it was held that during the life of his wife the income went to both daughters equally as in default of appointment, because they took vested interests unless and until the power was validly exercised. The result accords with Lord St. Leonards' rule, but hardly with the intention of the testator.

(Theobald 674.)

Gift to "any wife of my son who may survive him"—effect of divorce.— If a testator gives a life interest to his daughter, and after her death a life interest to any husband she may marry who survives her, or gives his daughter power to appoint a life interest to any husband who survives her, what is the position if the daughter's marriage is terminated by divorce? In *Bullmore* v. *Wynter* (1883), 22 Ch. D. 619, Fry, J., held that the husband could take: he was a husband and he survived, although he had lost the status of a husband before he became the survivor. He brushed aside the argument that the daughter might be survived by three "husbands", from two of whom she had been divorced, in which case obviously only the third husband could take. His decision was very severely criticised by Kay, J., in *Re Morrison* (1888), 40 Ch. D. 30, and was not followed in *Re Williams' Settlement,* [1929] 2 Ch. 361 (a decision of the Court of Appeal, where the daughter was survived by three ex-husbands), *Bosworthick* v. *Clegg* (1929), 45 T. L. R. 438, and *Re McComiskey,* [1939] Ir. R. 573. It was therefore hardly surprising that when the point arose again in *Re Slaughter* (1945), 61 T. L. R. 452, Vaisey, J., refused to follow *Bullmore* v. *Wynter,* though he did so with some regret. The testator gave his son a special power to appoint a life interest to any wife who might survive him. In 1934 the son appointed a life interest by deed to his wife Valerie. In 1937 the marriage was dissolved on Valerie's petition, and the son died. It was held that the appointment to Valerie failed: she was not an object of the power because she was not a wife when she survived the son. Vaisey, J., said there was much to be said in favour of the wife when the appointment was made by deed and the appointee possessed the status of a wife at the date of the deed. And it seemed "rather strange" that the wife should be precluded from exercising her right to seek dissolution of the marriage

except at the cost of losing her interest. But the authorities establish that it makes no difference whether the gift to the wife or husband is a direct gift or is made by deed in exercise of a special power (*Re Williams' Settlement, Bosworthick* v. *Clegg*) or whether the surviving spouse is the respondent or the petitioner (*Re Williams' Settlement*).

(Theobald 240.)

Condition to take testator's surname—invalidity.—Re Fry (1945), 61 T. L. R. 449, is an object-lesson in how not to draft a name and arms clause. The testator (who died in 1919) directed his trustees to hold the residue of his estate on trust (after a life interest to his widow) for the eldest son of his widow who should attain twenty-one or failing him for the eldest daughter of his widow who should attain twenty-one or marry under twenty-one. Clause 9 provided that it should be a "condition appurtenant" to the taking of the estate that the person so taking should "take" and "continue to bear" the testator's surname. There was no gift over. The widow married again; she had no son, but she had a daughter who married in 1942. The daughter's husband strongly objected to taking the testator's surname unless he had to. The daughter took out a summons to have it determined whether clause 9 was void or valid, and if so at what date she had to "take" the testator's surname and for what period she had to "continue to bear it". Vaisey, J., held (1) the condition was a condition subsequent and not a condition precedent, so that it only operated when the daughter became entitled in possession, and not before (following *Re Greenwood,* [1903] 1 Ch. 749); (2) the condition was void on three grounds: (a) It was repugnant to the antecedent absolute gift, there being no gift over (following *Musgrave* v. *Brook* (1884), 26 Ch. D. 792). (b) It was void for remoteness, since the daughter was not a life in being when the testator died. She could have been given a life interest conditional on her taking and determinable on her discarding the testator's surname, but not an absolute interest. (c) It was contrary to public policy to try and force a woman to take a name different form that of any husband she might marry. This third ground is the most interesting to conveyancers, because it is entirely novel, but the learned Judge's reasons seem convincing. Apart from the difficulties caused by such temporary phenomena as ration books and identity cards, there was the perennial embarrassment of the spouses registering in hotels under different names, and the entry of particulars of births of children: in fact it was not too much to say that the married woman's life would be one long series of dilemmas and predicaments if she had a different name from her husband, and the inconvenience would affect not only the spouses and their children, but relatives, friends, acquaintances and society generally. Moreover, although the daughter's present husband was willing to change his name if he had to, other husbands or prospective husbands might not be so accommodating. The proper way to make a female take the testator's name is, of course, to impose the condition upon her husband as well. *Re Fry* does not appear to necessitate any change in the precedents for name and arms clauses in Key & Elphinstone or Prideaux. On the other hand, it shows clearly that home-made clauses are a poor substitute for the well-tried forms.

(Theobald 510, 512, 516, 521; 2 K. & E. 733—736.)

Commorientes—section 184 *of L. P. A.,* 1925.—By a majority of two to three the House of Lords in *Hickman* v. *Peacey,* 61 T. L. R. 489, have reversed the decision of the Court of Appeal in the same case *sub nom. Re Grosvenor,* [1944] Ch. 138, discussed in Volume 9 of the *Conveyancer,*

at pp. 50, 169. As the lower Courts were themselves divided, the result was finally reached by a majority of five Judges (Cohen, J., Luxmoore, L.J., Lords Macmillan, Porter and Simonds) to four (Lords Greene, Goddard, Simon and Wright). Section 184 of the Law of Property Act, 1925, provides that " In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court) for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder ". According to the majority of the Court of Appeal, the section only applies when the deaths took place consecutively, and it is uncertain which death took place first; it does not apply at all when the proper inference is that the deaths were simultaneous, for then the uncertainty contemplated by the section does not exist. But according to the majority of the House of Lords, the section applies in all cases when it cannot be proved that one death occurred before the other, even though they were probably simultaneous. The minority view contemplates three possibilities: (1) one death certainly occurs before the other (the section does not apply); (2) the deaths occur consecutively, but it is uncertain in what order (the section applies); (3) the deaths occur simultaneously (the section does not apply). The majority view contemplates only two possibilities: (1) it is certain that one person survived the other (the section does not apply); (2) it is uncertain whether one person survived the other, either because (a) there is no evidence as to the order of their deaths, or because (b) there is evidence that they died simultaneously (the section applies). As Lord Macmillan put it, " Can you say for certain which of these two dead persons died first? If you cannot say for certain, then you must presume the older to have died first. It is immaterial that the reason for your inability to say for certain which died first is either because you think they both died simultaneously, or because you think they died consecutively, but you do not know in what sequence " (p. 493). Dealing with the metaphysical argument that time is infinitely divisible, Lord Macmillan aptly quoted a remark of Lord Robertson's in a Scottish case: " There are times and places for everything, and I should hardly have thought a Tramway Act exactly the occasion which Parliament would choose for teaching business men metaphysics unawares ".

No one will deny that there is logic on the side of those dissenting, but the balance of convenience seems to lie with the majority. If the Court of Appeal decision had stood, an application to the Court would have been needed almost inevitably in every case of simultaneous or nearly simultaneous deaths. The result of the decision of the House of Lords is that such applications will only be necessary in the rarest cases, and this will substantially assist executors and administrators. It is, of course, quite immaterial whether the statutory presumption accords with the probabilities of the case or not. If two persons are washed off a ship by the same wave, it is reasonable to assume that the older will die first if she is a lady of seventy who cannot swim and the younger is a man of thirty who can. Conversely, it is reasonable to assume that the younger will die first if he is an infant of tender years and the elder is an adult. But the great thing in such cases (as in the rule of the road) is to have a rule of some sort on which to rely. Consequently it would have been unfortunate if, as the Court of Appeal thought, we were left with no presumption at all in cases where the deaths are simultaneous. The English statutory presumption is simple and easy to apply and seems likely to lead to less awkward results than the German presumption that the deaths are simultaneous (*Re Cohn*, [1945] Ch. 5) or the Scots rule that there is no presumption at all (*Drummond's Judicial Factor* v. *H.M. Advocate*, [1944] S. C. 298).

One of the mysteries of the section which has led to much speculation is the meaning of the words in brackets ("subject to any order of the Court"). In *Re Lindop,* [1942] Ch. 377, it was suggested in argument that these words give the Court a discretion to disregard the statutory presumption if it thinks it would be unfair or unjust to act upon it. But Bennett, J., thought they merely made it clear that the presumption was rebuttable, and Luxmoore, L.J., in *Re Grosvenor,* agreed with him. On the other hand, Lord Greene, M.R., in that case suggested that they enable the Court to make a subsequent order in the event of fresh evidence becoming available. And in the House of Lords Lord Simon suggested that they were intended to provide for a case where sufficient evidence as to the respective ages of the deceased persons was not forthcoming (p. 491). None of these suggestions seems at all convincing, and it is difficult to disagree with Lord Simonds, who "tried in vain to give any reasonable meaning and effect" to the words (p. 499). In view of the statements in the House of Lords that the Legislature cannot have intended not to make any provision for simultaneous deaths, the most startling suggestion of all about the meaning of the words is that of the draftsman himself. In the 12th edition of Wolstenholme and Cherry's *Conveyancing Statutes,* Vol. 1, p. 548, the learned editors, commenting on the words "subject to any order of the Court", say, "it is still open for the Court to hold as a fact that the deaths were simultaneous, or occurred in any particular order". Thus it would appear that the draftsman did not contemplate that the section would apply to simultaneous deaths. Fortunately, as so often happens, the interpretation of the section by the Courts has given it a more sensible meaning than that intended by the draftsman.

(Theobald 543.)